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OFFICE SUPREME COURT, U.S.
FILED
MAY 12 1960
JAMES R. BROWNING, Clerk

No. 86
October Term 1959

IN THE

Supreme Court of the United States

THE CALIFORNIA COMPANY, a corporation,
Appellant,

v.

STATE OF COLORADO; ROBERT A. THEOBALD, as Director of Revenue of the State of Colorado; HOMER F. BEDFORD, as Treasurer of the State of Colorado,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

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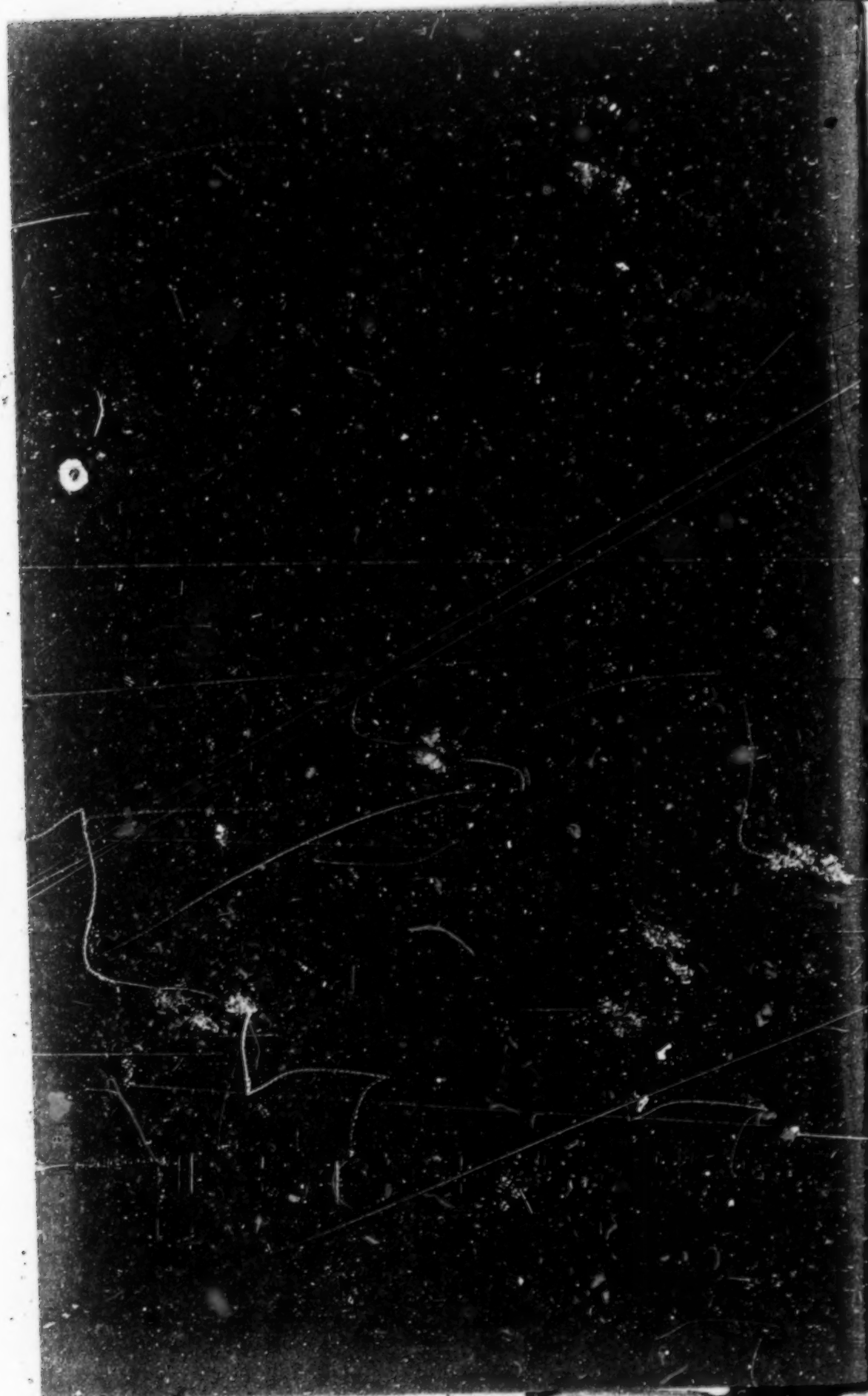
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Filed: May 1960



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STATE OF COLORADO; ROBERT A. THEOBALD, as Director of Revenue of the State of Colorado; HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the Supreme Court of the State of Colorado entered on December 21, 1959, insofar as said final judgment (a) affirmed the judgment of the District Court of the City and County of Denver, State of Colorado, in holding that the graduated Gross Income Tax Act or statute contained in Chapter 131, Colorado Session Laws 1953 (Colorado Revised Statutes 1953, Section 138-1-7), hereinafter called "the Act", is valid and is not repugnant to the due process and equal protection provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States and (b) affirmed the judgment of said District Court of the

City and County of Denver in holding that, as applied to the proceeds realized by the Appellant from the greater portion of its oil production in 1953 as set forth in the Complaint and Amended Complaint less the amount ordered refunded by the judgment of the Colorado Supreme Court for the period up to March 27, 1953 (on which date the Act was approved), the imposition of the tax on such proceeds or income is not a tax on interstate commerce or gross proceeds derived therefrom and does not constitute an unreasonable burden upon interstate commerce in violation of and so as to render the Act, as applied to said proceeds, repugnant to the interstate commerce provisions of Subdivision (3), Section 8, Article I, of the Constitution of the United States.

OPINION AND JUDGMENTS BELOW

The opinion of the Supreme Court of the State of Colorado is not yet reported in the official Colorado Supreme Court Reports, but is reported in 348 Pac. (2d) 382 (February 19, 1960, Advance Opinions). A copy of said opinion of the Supreme Court of the State of Colorado and of its judgment and of the judgment of the State District Court are attached hereto as Appendix A.

JURISDICTION

This suit was brought in the State District Court to recover the amount of the graduated gross income tax paid by the Appellant together with interest thereon as provided by statute. The tax base was the proceeds received by Appellant from the sale of its oil and gas production in the entire year of 1953. The Appellant challenged the Act upon the grounds that it was repugnant to the provisions of the Constitution of the United States as referred to above. The Colorado Supreme Court upheld the Act. The opinion of the Colorado Supreme Court was rendered and its judgment entered on December 21, 1959. Notice of Appeal was filed with the Colorado Supreme Court on March 16, 1960.

The jurisdiction of the United States Supreme Court to review the decision of the Colorado Supreme Court by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Allied Stores of Ohio, Inc. v. Bowers, Tax Commissioner of Ohio*, 358 U. S. 522, 79 S. Ct. 437, 3 L. Ed. (2d) 480; *Railway Express Agency v. Commonwealth of Virginia*, 347 U. S. 359, 74 S. Ct. 558, 98 L. Ed. 757; *Railway Express Agency v. Commonwealth of Virginia*, 358 U. S. 434, 79 S. Ct. 411, 3 L. Ed. (2d) 450; *Nelson v. City of New York*, 352 U. S. 103, 77 S. Ct. 195, 1 L. Ed. (2d) 171; *Welch v. Henry*, 305 U. S. 134, 59 S. Ct. 121, 83 L. Ed. 87; *Richfield Oil Corp. v. State Board of Equalization*, 329 U. S. 69, 67 S. Ct. 156, 91 L. Ed. 80; *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U. S. 249, 53 S. Ct. 345, 77 L. Ed. 730; *New York Rapid Transit Corp. v. City of New York*, 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024.

QUESTIONS PRESENTED

Question No. 1. Whether the Act is repugnant to the due process and equal protection provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States because:

(a) Without reasonable basis, a graduated tax rate is imposed on gross income from the production of oil and gas in varying amounts.

(b) The Act singles out and places in a separate class taxpayers, including Appellant, having gross income based on the sale of oil or gas and requires the taxpayers in that class only to pay the graduated tax imposed by said Act in addition to the net income tax imposed by Sections 138-1-2 to 138-1-5, Colorado Revised Statutes 1953.

(c) The Act singles out and places in a separate class for the imposition of the tax only those taxpayers who

have a gross income based upon the sale or other disposition of oil and gas production and excludes from its coverage the production or extraction of oil and gas used or consumed rather than sold or otherwise disposed of.

(d) Special classes of taxpayers referred to in Section 138-1-6, Colorado Revised Statutes 1953, namely, banks, industrial banks, Morris Plan companies, trust companies and finance and loan associations, are exempt from such tax without reasonable basis for such exempt classification.

(e) Without reasonable basis for such classification, the tax is imposed on the proceeds from oil and gas production only and is not imposed on the proceeds from any other natural resources mined, extracted or produced from deposits in the State of Colorado.

(f) The Act discriminates against taxpayers, including the Appellant, whose returns were based on the calendar year 1953 rather than on a fiscal year beginning during said year.

Question No. 2. Whether the Act infringes on the interstate commerce provisions of Section 8, Article I, of the Constitution of the United States, as applied to the proceeds received by Appellant from sales of oil made pursuant to contracts resulting in interstate movement of oil, which contracts are referred to, infra, page 10, in the quotation from the Colorado Supreme Court opinion.

STATUTES INVOLVED

The following statutes are set forth in Appendix B hereto:

Colorado Session Laws 1953:

Chapter 131 (this is the graduated gross income tax Act on proceeds from oil and gas production approved and effective March 27, 1953, and adopted

as an amendment to the Colorado net income tax Act and subsequently embodied in Colorado Revised Statutes 1953 as Section 138-1-7).

Colorado Revised Statutes 1953:

Sections 138-1-1
138-1-2
138-1-3
138-1-6
138-1-39 (3)
138-1-40
138-1-45

(Sections from the Colorado net income tax statutes.)

STATEMENT

Effective as of March 27, 1953, the Colorado Legislature amended the net income tax Act by imposing (in addition to a tax on net income) a graduated tax on the proceeds from oil and gas produced in Colorado. This Act is Chapter 131, Colorado Session Laws 1953, set forth in full in Appendix B, and is now incorporated as Section 138-1-7, Colorado Revised Statutes 1953. The validity of this graduated gross income tax Act is the subject of this Appeal.

The material part of this Act is as follows:

"Section 1. Section 2 of Chapter 175, Session Laws of Colorado, 1937, as amended, is hereby further amended by adding a new subsection (f), reading as follows:

"(f) (1). In addition to the tax imposed by subsections (a), (b), (c) and (d) of this section, there shall be levied, collected and paid for each taxable year ending on and after December 31, 1953, upon that portion of the gross income of every person which is de-

rived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state a tax at the following rates:

Under $25,000	2%
$ 25,000 and under $100,000	3%
$100,000 and under $300,000	4%
$300,000 and over	5%

"For the purposes of this subsection (f) (1), the words 'gross income derived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state' means the entire amount realized from the sale or other disposition of all crude oil and natural gas produced or extracted during any taxable year from petroleum deposits located within this state.

"(2) There shall be allowed as a credit against the tax computed in accordance with the provisions of paragraph (1) of this subsection (f) an amount equivalent to the sum of all ad valorem taxes levied, assessed and paid during the taxable year upon crude oil, natural gas, oil and gas lease holds and leasehold interests, and oil and gas royalties and royalty interests for state, county, municipal, school district and special district purposes, except such ad valorem taxes as may be levied, assessed and paid for such purposes upon equipment and facilities used in drilling for, production of, storage of, and pipeline transportation of crude oil and natural gas. Receipts evidencing payment during the taxable year of such ad valorem taxes to the treasurers of the several counties of this state shall be prima facie evidence for the allowance of the credit hereby allowed, provided, however, that the Director of Revenue may require such additional evidence as he may deem necessary for the purpose.

Subsections (a), (b), (c) and (d) in (f) (1) cover the im-

position of a net income tax and are now found as Sections 138-1-2, 138-1-3, 138-1-4 and 138-1-5, Colorado Revised Statutes 1953.

In the calendar year 1953 the Appellant received gross income from its oil and gas production in the State of Colorado in the amount of approximately $26,000,000.00. The graduated tax computed according to the statute on said sum was $1,296,064.13 (which includes $167.73 tax withheld on production of other taxpayers). The ad valorem tax credit under the statute amounted to $342,493.73, leaving the amount of tax payable as the sum of $953,402.67.

In April 1954 Appellant paid the tax under protest to the State of Colorado.

In August 1954 Appellant filed its "Claim for Refund" with the State Department of Revenue demanding refund of the tax so paid.

The Director of Revenue in January of 1955 denied the Claim for Refund, with the exception of (a) the tax paid on oil and gas with a value of $122,798.36 used for fuel in producing operations on the lease premises, rather than sold, holding that the tax did not apply to such oil and gas and (b) one other small item.

In July 1955 Appellant instituted suit against the State of Colorado, its Director of Revenue and its Treasurer by the filing of a Complaint in the State District Court, City and County of Denver, praying for judgment for the amount of the tax so paid, with interest. The State answered and counterclaimed claiming the tax on the oil and gas used as fuel and asking for an accounting.

The State District Court rendered judgment on February 15, 1958. It dismissed Appellant's Complaint, upholding the validity of the Act and declaring it effective for the entire year 1953, although not approved until March 27, 1953. On the State's counterclaim the District Court ruled that the tax did not apply to oil and gas used

as fuel, rather than sold, but ordered an accounting for other reasons. Appellant had argued that the State could not question the act of its own Official, the Director of Revenue, in deciding to allow a refund for the tax paid on the oil and gas used as fuel, but the District Court said it was not necessary to answer this contention "because the Court concludes that the allowance by the Director of Revenue was correct".

Appellant sued out a Writ of Error in the Colorado Supreme Court to the State District Court judgment on May 13, 1958. The State did not appeal from the ruling of the District Court that the tax does not apply to oil and gas used as fuel, rather than sold.

The Colorado Supreme Court opinion was rendered and its judgment entered December 21, 1959. The Colorado Supreme Court affirmed the State District Court, except that (a) it held that the Act was not effective until approved on March 27, 1953, and ordered the State to refund the tax paid for the period January 1, 1953, to March 27, 1953, and (b) it set aside the judgment of the District Court in so far as it ordered an accounting, saying that the Director of Revenue had determined Appellant's tax liability and that "Apparently the decision of the Director of Revenue is final against the State, for 138-1-36 makes available only the remedy to be pursued in the event the taxpayer is dissatisfied with the Director's decision".

Pursuant to the Colorado Supreme Court judgment, the State has already refunded to the Appellant $282,-961.58 principal plus interest at 6% from the time the tax was paid in 1954. This represented the refund of the tax for the period January 1, 1953, to March 27, 1953. As a result, this case concerns the balance of the tax paid on 1953 production amounting to $664,468.90, plus interest at 6% per annum from the time the tax was paid in April 1954. (Note: The said principal sum of $664,468.90 represents the amount of $953,402.67 tax paid less the amount of $5,972.19 refunded by the Director of Revenue prior to

the institution of the suit and less $282,961.58 refunded as a result of the Colorado Supreme Court's decision and representing tax paid for the period January 1, 1953, to March 27, 1953.)

The Appellant, in its written protest at the time the tax was paid, in its Claim for Refund filed with the State Department of Revenue, in its Complaint filed in the State District Court and in the Colorado Supreme Court, affirmatively and expressly claimed and alleged that the Colorado graduated gross income tax Act was arbitrary, discriminatory and based upon an unreasonable classification and thus repugnant to the due process and equal protection provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The State District Court and the Colorado Supreme Court held that the statute is not repugnant to the due process and equal protection provisions of the Fourteenth Amendment and the Colorado Supreme Court decision is in favor of the validity of the statute.

Further, Appellant, in its protest at the time of the tax payment, in its Claim for Refund, in its Complaint filed in the State District Court and in the Colorado Supreme Court, expressly raised the question that the tax as imposed on the proceeds from a substantial portion of Appellant's oil production in the year 1953 constituted an unreasonable burden upon interstate commerce in violation of the interstate commerce provisions of Section 8, Article I, of the Constitution of the United States.

The State District Court and the Colorado Supreme Court considered the interstate commerce question, but upheld the validity of the tax as against said contention. Of the tax on the approximate $26,000,000.00 proceeds from 1953 production, the tax on approximately $25,000,000.00 was claimed by Appellant to be invalid as an unreasonable burden on interstate commerce in violation of the Federal Constitution. In upholding the validity of the tax as against the interstate commerce objection, the Colorado

Supreme Court quoted the following from the findings of the Trial Court:

"'The production and marketing procedure is substantially as follows:

"'Oil and gas reach the surface (referred to in the testimony as the "well head") as a homogeneous mass; and, of physical necessity, if oil is brought to the surface, gas is mixed with it. (However, as will be mentioned in more detail later herein, as the rate of production of oil increases, the rate of production of gas increases in more rapid progression.)

"'After the admixed oil and gas reach the well head, the mixture flows by pipe (owned by the California Company) to a "separator". The separator processes the mixture to remove most of the gas from the oil. The oil then flows by pipe (owned by the California Company) to a "heater-treater" where the remainder of the gas is removed from the oil. From the heater-treater, the oil is transported by pipe (owned by the California Company) to "lease tanks" (owned by the California Company) in which the oil is temporarily stored and is gauged or measured. To this point, the oil has not left the lease site or its immediate vicinity, and it is the sole property of the producer—the California Company.

"'The lease tanks are connected to an interstate pipeline operated as a common carrier, and, at the instant the oil leaves the lease tanks, it starts its journey in interstate commerce. The California Company does not own and it has no interest in the interstate pipeline. To the contrary, that pipeline is owned and operated by a separate corporation.

"'The California Company retains title to and retains all of the increments of ownership of the oil up to the point in the production process that the oil leaves the lease tanks, but, by contract, title and all

increments of ownership pass to a purchaser at the instant the oil leaves the lease tanks and enters the interstate pipeline. The California Company itself send no oil owned by it through the pipeline. Instead, all of the oil it produces in the State of Colorado is sold to other corporations—that is, to Standard Oil Company of California, Western States Refining Company and Uinta Oil Refining Company, all of which are corporations entirely separate and distinct from plaintiff and entirely separate and distinct from the pipeline company—and these sales are fully consummated when the oil leaves the lease tanks. At that instant, the purchaser's firm obligation to pay for the oil comes into being, and all risk of loss is on the purchaser.

"'The evidence shows that although the California Company is part of the corporate chain of Standard Oil Company of California, the California Company is a separate corporation; and, at least as to all oil it produces in Colorado, the company acts only as a producer and not as a marketing company. The total interest of the California Company in all oil it produces in Colorado ceases after the oil has been produced and twice processed by the company, but long before the oil leaves the State of Colorado.'

"It thus appears that The California Company extracts a natural resource from the earthy depths of Colorado, processes the material here and delivers the product from its tanks into a pipe line located in Colorado where the product starts its interstate journey. The delivery into the pipe line is pursuant to contract between The California Company and Standard Oil Company:

"'Crude oil sold under this agreement shall be delivered for Buyer's account to the pipe lines connected to Seller's lease and fee storage tanks in the Rangely Field for interstate shipment. Title to crude

oil thus delivered shall pass to Buyer when the oil passes the outlet valves of such storage tanks.'"
(Feb. 19, 1960, Adv. Op., pages 395-396)

THE QUESTIONS ARE SUBSTANTIAL

1. As indicated above, in the State District and Supreme Courts Appellant urged that the Colorado Act, which imposes a tax on gross income derived from oil and gas produced or extracted in Colorado, is arbitrary and discriminatory, and constitutes an unjustifiable classification, all in conflict with the Fourteenth Amendment of the Federal Constitution, because of the graduated rates of the tax. In support of this contention Appellant relied chiefly on the decisions of this Court in *Stewart Dry Goods Co. v. Lewis*, (1935) 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and *Valentine v. Great Atlantic & Pacific Tea Co.*, (1936) 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22.

In the *Stewart* case this Court held that a Kentucky statute imposing a graduated excise tax on all retail merchants measured by gross sales was unconstitutional. In the *Valentine* case the Court held that an Iowa statute imposing a graduated occupation tax on chain stores based on gross receipts was also unconstitutional.*

Despite the fact that the Colorado Supreme Court, in that portion of its opinion dealing with the Fourteenth Amendment, characterized the graduated tax in question here as "an excise upon the privilege of producing or extracting within the state, measured by the amount of sales", it refused to follow the apparently conclusive holdings of the *Stewart* and *Valentine* cases.

In so doing, the Colorado Court asserted that "Decisions of the Federal Supreme Court following the *Stewart* and *Valentine* cases have rendered opaque that which could

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* The Iowa statute also imposed graduated flat fees based on numbers of stores. The District Court upheld the validity of this portion of the statute ((D.C. Iowa 1935) 12 Fed. Supp. 760), and no appeal was taken from this part of the District Court's holding.

have been considered crystal clear by the pronouncements of those two cases", citing only *Great Atlantic & Pac. Tea Company v. Grosjean*, (1937) 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, and *Rapid Transit Corp. v. New York*, (1938) 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024.

In *Grosjean*, however, the Louisiana Act approved provided only for graduated flat fees, based on the number of stores involved, like the portion of the Iowa statute approved by the District Court in the *Valentine* case. In *Rapid Transit* the Act approved imposed a *flat* excise or privilege tax on gross receipts. Neither decision can, therefore, afford any basis for ignoring *Stewart* and *Valentine*, or for approving a *graduated* tax on gross receipts.

Neither the State of Colorado nor the Colorado Court cited, or could cite, any case, Federal or State, upholding the validity of a graduated tax on gross income or receipts.

The Colorado Supreme Court cited *American Mfg. Co. v. St. Louis*, (1919) 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084, and *Oliver Iron Min. Co. v. Lord*, (1923) 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929. These cases involved taxes based on gross sales and on the value of ores mined, *but at flat, not graduated rates.*

Paducah Automotive Trades Assn. v. City of Paducah, (1948) 307 Ky. 524, 211 S. W. (2d) 660, cited by the Colorado Court as leading it to the conclusion that *Stewart* and *Valentine* are no longer controlling, involved a license or privilege tax on certain businesses based on gross receipts, but the tax was levied at a flat, fixed percentage, and not at graduated rates (see 211 S. W. (2d) 666). *Mississippi v. Paramount-Gulf Theatres*, (1956) 226 Miss. 404, 84 So. (2d) 403, also cited by the Colorado Court, involved a "chain picture show tax" of 2% on each dollar derived from admissions by chains of 10 theatres or less, and 5% on each dollar derived from admissions by chains having more than 10 theatres. The Step-up in rates was based on number of theatres, however, not gross receipts,

and the Mississippi Court held this reasonable. In *Jackson v. Glenwood Springs*, (1950) 122 Colo. 323, 221 Pac. (2d) 1083, the last State case cited by the Colorado Court in this connection, the Court had before it an ordinance levying an occupational tax on businesses in Glenwood Springs of $20 for the first employee, plus $6 for each additional employee up to 9, plus $1 for each employee in excess of 9. The ordinance had nothing to do with gross receipts and the Court did not even refer to the *Stewart* or *Valentine* case.

Appellant, on the other hand, cited a number of cases decided since *Stewart* and *Valentine*, holding invalid, on the strength of those decisions, graduated taxes on gross receipts or sales. In a number of these cases this Court denied certiorari. *Great Atlantic & Pacific Tea Co. v. Harvey*, 107, Vt. 215, 177 Atl. 423, holding invalid a Vermont statute imposing a graduated tax on gross sales of chain stores; *National Tea Co. v. State of Minnesota*, 205 Minn. 443, 286 N. W. 360, holding invalid a Minnesota statute imposing a graduated tax on gross sales — this Court refused jurisdiction on appeal (309 U. S. 551, 84 L. Ed. 920) because it could not tell whether the State Court had decided the case under the Federal Constitution or the State Constitution — upon remand the Minnesota Supreme Court (208 Minn. 607, 294 N. W. 230) held that its decision was to the effect that the statute was violative of the uniformity clause of the State Constitution; *Lane Drug Stores, Inc., et al. v. Lee, et al.*, 11 Fed. Supp. 672, held invalid a Florida statute in so far as it imposed a graduated tax on gross receipts of chain stores; *Ed. Schuster & Co., Inc. v. Henry*, 218 Wisc. 506, 261 N. W. 20, certiorari denied 296 U. S. 625, 80 L. Ed. 444, holding invalid a Wisconsin statute imposing a graduated tax on gross sales; *Volusia County Kennel Club, Inc., et al. v. Haggard, et al.*, ... Fla. ....., 73 So. (2d) 884, certiorari denied 348 U. S. 865, 99 L. Ed. 681, holding invalid a graduated tax on daily gross receipts of dog race tracks; *State ex rel. Lane Drug Stores, Inc. v. Simpson*, 122 Fla. 582, 166 So. 227, and *State ex rel. Adams*

v. Lee, 122 Fla. 639, 166 So. 258, holding invalid a graduated tax on gross receipts of chain stores.

Possibly conscious of the fact that it did not, and could not, cite any good authority for ignoring the controlling holdings in *Stewart* and *Valentine*, the Colorado Court *suggests* — but does no more than suggest — an alternative ground for its holding by saying that "should" the credit allowed by the Colorado Act make the tax in question a net income tax under *Welch v. Henry*, (1938) 305 U. S. 134, 59 S. Ct. 121, 83 L. Ed. 87, it would have another reason for upholding the validity of the tax. *Welch v. Henry*, however, involved a tax on gross dividend income, less $750. The State Court, upholding the tax, treated the tax as one on net income, because of the $750 deduction allowed, as indeed the statute said it was (see 223 Wisc. 319, 271 N. W. 68). This Court affirmed and, although in its opinion it made no express statements as to whether it considered the tax a net income tax or not, we believe the Colorado Court correctly stated that the Wisconsin Court's interpretation of the Wisconsin statute as imposing a net income tax "was tacitly accepted by the Federal Supreme Court in its decision". However, no deduction from gross receipts is allowed by the statute here in question. The Colorado Act allows a *credit* against the tax payable on the gross income from oil and gas, once the amount of that tax has been calculated, in an amount equal to the ad valorem taxes on the oil, gas and leaseholds concerned levied, assessed and paid during the year. This, of course, is not the same as allowing a deduction from gross income or receipts, and completely distinguishes *Welch v. Henry* from the case at bar. It is difficult to understand how a credit against a tax on gross income, to be applied after the tax has been computed, can possibly be said to make the tax a tax on net income.

Lastly, the Colorado Court *suggests* — but again does no more than suggest — a possible distinction of the *Stewart* case, as involving a tax "not confined to a particular method of merchandising". It does not, however, suggest

any way to distinguish the *Valentine* case, which did involve a particular method of merchandising, i.e., chain stores, which had many of the justifying factors claimed by the State of Colorado to be present here. Quite apart from the *Stewart* case, the *Valentine* case is controlling here, and no good reason for not following it has been suggested.

The question whether the Colorado tax in question violated the due process and equal protection clauses of the Fourteenth Amendment under the decisions of this Court is, therefore, a substantial one.

2. In addition to the invalidity of the Act under the Fourteenth Amendment because of the graduation of the tax imposed thereby, Question No. 1, supra, sets forth five additional grounds based upon facts in the Record and upon which Appellant claims that the Act is arbitrary and discriminatory and is thus repugnant to the due process and equal protection provisions of the Fourteenth Amendment.

Recognizing the power of the Legislature to make reasonable classifications in tax legislation, the Colorado Act goes beyond the limits of reasonable classification as defined by this Court in *Ohio Oil Company v. Conway*, 281 U. S. 146, 50 S. Ct. 310, 74 L. Ed. 775, 782, and in *James C. Colgate v. Erwin M. Harvey*, 296 U. S. 405. 80 L. Ed. 299, 56 S. Ct. 252.

3. In addition to urging in the State District Court and the State Supreme Court that the Colorado graduated gross income tax is unconstitutional under the Fourteenth Amendment, Appellant also urged that the Act, as applied to the proceeds from a substantial portion of the Appellant's oil production, constitutes a direct and unreasonable burden on interstate commerce and, therefore, violates the commerce clause of the Federal Constitution. The Colorado Supreme Court likewise overruled this contention.

Supra, on page 10, we have quoted from the Colorado Supreme Court opinion. From the finding of the Trial

Court, approved by the Colorado Supreme Court, it appears that the oil in question comes to the surface mixed with gas, is then run into a separator which removes most of the gas, the oil is then run into a "heater-treater" where the remainder of the gas is removed, and then the oil is run to "lease tanks" where it is gauged or measured. Those lease tanks are connected to an interstate common carrier pipeline and, as found by the Court, "at the instant the oil leaves the lease tanks, it starts its journey in interstate commerce". The Appellant retains title to and ownership of the oil up to the time the oil leaves the lease tanks "but, by contract, title and all increments of ownership pass to a purchaser at the instant the oil leaves the lease tanks and enters the interstate pipeline". The oil is sold under contract to purchasing companies "and these sales are fully consummated when the oil leaves the lease tanks. At that instant, the purchaser's firm obligation to pay for the oil comes into being, and all risk of loss is on the purchaser". As stated in the sale and purchase agreement, the oil is "delivered for Buyer's account to the pipe lines connected to Seller's lease and fee storage tanks in the Rangely Field for interstate shipment. Title to crude oil thus delivered shall pass to Buyer when the oil passes the outlet valves of such storage tanks".

The Act imposes the tax on "the entire amount realized from the sale or other disposition of crude oil and natural gas produced or extracted during any taxable year from petroleum deposits located within this state".

In that portion of its opinion dealing with the interstate commerce question, the Colorado Court says that "This is not a tax on interstate commerce or gross receipts derived therefrom. It is an excise upon the gross receipts derived from the extraction of certain raw materials from the bowels of the earth in Colorado"; and again that "The incidence of the tax is not on the sale of the processed material; it is on gross receipts derived from the withdrawal of raw materials from the soil of Colorado".

However, as said by this Court in *American Mfg. Co.*

v. St. Louis, (1919) 39 S. Ct. 522, 63 L. Ed. 1084, 250 U. S. 459, at pages 462-463:

> " • • • as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the state court, but upon its practical operation and effect (citing cases)."

See also:

Richfield Oil Corp v. State Board, (1946) 329 U. S. 69, at page 84; 67 S. Ct. 156, at page .....; 91 L. Ed. 80, at page 93.

It is clear from the facts recited above, found by the Trial Court and adopted by the Colorado Supreme Court, that in practical operation and effect the tax *is* a tax on interstate commerce, or the gross receipts therefrom. The incidence of the tax is on the sale of the oil, and not on its production or extraction. This is confirmed by the Colorado authorities' construction of the Act as not applying to oil and gas admittedly produced and extracted in Colorado, but used or consumed as fuel in lease operations, rather than sold (see Statement, pages 7, 8, supra).

Further, the sales of the oil in question here are clearly in interstate commerce. See *Phillips Petroleum Co. v. Wisconsin*, (1954) 347 U. S. 672, at 677, 74 S. Ct. 794, at ....., 98 L. Ed. 1035, rehearing denied (1954) 348 U. S. 851, 75 S. Ct. 17, 99 L. Ed. 670. Accordingly, the Colorado tax is clearly a direct tax on the gross receipts from transactions in interstate commerce, and is invalid under the following decisions of this Court:

J. D. Adams Manufacturing Co. v. Storen, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365;

Freeman v. Hewit, 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265.

Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U. S. 157, 74 S. Ct. 396, 98 L. Ed. 583.

See also:

Gross Income Tax Division, Indiana Department of State Revenue v. Chicago District Electric Generating Corporation, 236 Ind. 117, 139 N. E. (2d) 161.

The Colorado Supreme Court was in error in rejecting the Appellant's interstate commerce contention and in relying upon *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929, and *American Mfg. Co. v. City of St. Louis*, (1919), 250 U. S. 459, 39 S. Ct. 523, 63 L. Ed. 1084, which involved intrastate activity only.

4. This case raises important Federal Constitutional questions. It is believed by Appellant that the opinion and judgment of the Colorado Supreme Court are in complete conflict with decisions of this Court directed to the due process and equal protection provisions of the Fourteenth Amendment on statutes legally identical with the Colorado graduated gross income tax Act, as well as with applicable decisions of this Court relating to burdens on interstate commerce. As pointed out, supra, other State and lower Federal Courts have unhesitatingly followed the decisions of this Court on similar statutes. It is submitted that among the States there should be uniform adherence to the law as laid down by this Court on Federal constitutional questions.

The Colorado Act has been in force since 1953. It is a continuing Act. A determination of the validity of the Act by the United States Supreme Court is important, not only to the State of Colorado, but to numerous taxpayers, in addition to Appellant. The general and public importance to the State and the taxpayers alike is recognized and stated by the State District Court in its opinion, from which we quote the second and the last paragraphs:

> "Immediately involved in the case is the refund to the California Company of almost $1 million paid by it as its 1953 tax under the questioned statute. However, the Court judicially notices that indirectly involved are the potential claims of all oil producers in

Colorado for all years from 1953 to date; and the total sum at stake may well reach $30 million before the matter is finally adjudicated by a court of last resort.

* * * * * *

"The Court is aware that other oil companies have filed companion cases challenging the constitutionality of this statute, and that those cases, though pending, have been permitted to lie dormant awaiting the outcome of this case. Recognizing the probable interest of the parties and counsel in those related cases in the outcome of this case, the Court has had this opinion mimeographed, and copies may be obtained from the Division Clerk upon request of counsel in the companion cases."

We believe that the questions presented by this Appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

DECEMBER 21, 1959, COLORADO SUPREME COURT OPINION

No. 18652

THE CALIFORNIA COMPANY,
a corporation,
Plaintiff in Error,

v.

STATE OF COLORADO; ROBERT A. THEOBALD, as Director of Revenue of the State of Colorado; HOMER F. BEDFORD, as Treasurer of the State of Colorado,
Defendants in Error.

Error to the District Court of the City and County of Denver
Honorable Edward J. Keating, Judge

EN BANC

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART

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MR. JUSTICE FRANTZ delivered the opinion of the Court.

This case involves the constitutional validity of Chapter 131, Colo. Sess. Laws 1953 (C.R.S. '53, 138-1-7), popularly called the "severance tax," imposing a graduated tax on gross income "derived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state. . . ." Adjudicated invalidation was sought in the trial court without success. There, as here, the Act was challenged on the ground that it contravened by word, and by deed performed pursuant to the word, certain provisions of both the federal and state constitutions. Direction for an accounting before the trial court is also assailed here.

It is said that the Act: (1) denies The California Company due process and equal protection of the law in violation of federal and state constitutional provisions; (2) does not impose an income tax authorized by Section 17, Article X of the state constitution, but, in fact, is incongruous to said section; (3) brings down with it said Section 17, Article X, if sanctioned by the latter, since both would be offensive to the federal due process and equal protection clauses; (4) imposes a property or ad valorem tax in violation of the uniformity provision of Section 3, Article X, and in violation of the ceiling provision of Section 11, Article X of the state constitution; (5) has a defective title; (6) provides for, and has been construed as, operating retroactively in contravention of Section 11, Article II of the state constitution, and (7) is applied in such manner that it puts an unreasonable burden on interstate commerce, thereby infringing the commerce clause of the federal constitution.

The title of the Act thus impugned is "An Act relating to revenue and taxation, and to amend Chapter 175, Session Laws of Colorado 1937, as amended by all subsequent acts." Said Chapter 175, Sess. Laws Colo. 1937, provided for a graduated income tax. As enacted the 1953 law under present attack added subsection (f) to Section 2 of said Chapter 175, as amended.

Our disposition depends upon the wording, context and interpretation of certain parts of the 1953 Act. Material portions of the assailed Act follow:

"(f) (1). In addition to the tax imposed by subsections (a), (b), (c) and (d) of this section, there shall be levied, collected and paid for each taxable year ending on and after December 31, 1953, upon that portion of the gross income of every person which is derived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state a tax at the following rates:

Under $25,000	2%
$ 25,000 and under $100,000	3%
$100,000 and under $300,000	4%
$300,000 and over	5%

"For the purposes of this subsection (f) (1), the words 'gross income derived from the production or extraction of crude oil and natural gas from petroleum deposits located within this state' means the entire amount realized from the sale or other disposition of all crude oil and natural gas produced or extracted during any taxable year from petroleum deposits located within this state.

"(2) There shall be allowed as a credit against the tax computed in accordance with the provisions of paragraph (1) of this subsection (f) an amount equivalent to the sum of all ad valorem taxes levied, assessed and paid during the taxable year upon crude oil, natural gas, oil and gas leaseholds and leasehold interests, and oil and gas royalties and royalty interests for state, county, municipal, school district and special district purposes, except such ad valorem taxes as may be levied, assessed and paid for such purposes upon equipment and facilities used in drilling for, pro-

duction of, storage of, and pipeline transportation of crude and natural gas. * * *

"From and after May 1, 1953 every producer, which term is hereby defined to mean every person producing or extracting crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state, or every first purchaser of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state, or every first purchaser of crude oil, natural gas, or both crude oil and natural gas produced or extracted from petroleum deposits located within this state, as the case may be, shall withhold from every royalty payment made to any person claiming or having an interest in any oil or natural gas so produced, except from royalty payments made to the United States of America or the State of Colorado, an amount equal to 3% of such royalty payment, and shall pay to the Department of Revenue, on or before the fifteenth day of October, 1953 the aggregate amount of all such withholdings made during the months of May, June, July, August and September of 1953, and shall on or before the fifteenth day of January, April, July and October in each year thereafter pay to the Department of Revenue the aggregate of all such withholdings made during ing the three preceding months, and shall upon the dates aforesaid file reports covering such withholdings upon forms to be prescribed by the Director of Revenue; provided, however, that nothing contained herein shall be so construed as to reduce the tax imposed by subsection (f) (1) hereof.

"Every person making a return as required in subsection (f) (3) hereof may take credit for the amount withheld by the producer or the first purchaser against the tax shown to be due upon such return, and any overpayment shown on such return shall be refunded to the taxpayer.

"Section 2. The tax hereby imposed is declared to be a special classified and limited tax in accordance with the provisions of Section 17 of Article X of the constitution of the State of Colorado."

Is the state tax upon such gross income at progressive rates constitutionally valid? In broad outline, this appears to be one of the basic questions which we must resolve. And if such tax is valid, does it so burden interstate commerce in manner and amount that we must annul it? Since proper resolutions of these questions depend in great measure upon the kind of tax with which we are dealing, it becomes necessary initially to determine the nature of the tax.

That the problem of the nature of the tax has vexed the courts is borne out by the diversity of views appearing in the decisions. "This has been, and still is, a very troublesome problem for the courts; and the conclusions reached are by no means consistent, even with the same court." Constitutional Limitations On Progressive Taxation of Gross Income, by Robert C. Brown, 22 Iowa L. Rev. 246.

Originally the Supreme Court of the United States held that a federal tax on income derived from real property was tantamount to a tax on the property, and therefore, ran afoul of the constitutional provision that direct taxes shall conform to the rule of apportionment. At the same time the decision engendered dubiety as to the nature of a tax on the receipts obtained from personal property. *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 15 S. Ct. 673, 39 L. Ed. 759. On rehearing it was determined that federal taxation upon income from real and personal property was a direct tax on the property itself. *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 601, 15 S. Ct. 912, 39 L. Ed. 1108.

Although the effect of these decisions has been overcome by the Sixteenth Amendment, adopted in 1913, which enabled Congress "to levy and collect taxes on incomes,

from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration," their impact on the law relating to income taxes has been great indeed.

Following these decisions the federal courts, for some time, and some state courts held income taxes to be property taxes, either on the theory that a tax on income earned from property is a tax on the property itself or that income itself is a form of property and a tax thereon makes it a property tax. Typical cases so holding are *Eliasburg Bros. Merc. Co. v. Grimes*, 204 Ala. 492, 86 So. 56, 11 A.L.R. 300; *Bachrach v. Nelson*, 349 Ill. 579, 182 N.E. 909; *Eaton, C. P. Co. v. Commonwealth*, 237 Mass. 523, 130 N.E. 99; *Opinion of the Justices*, 95 N.H. 537, 64 A. (2d) 320; *Kelly v. Kalodner*, 320 Pa. 180, 181 A. 598; *Power Inc. v. Huntley*, 39 Wash. (2d) 191, 235 P. (2d) 173. Massachusetts and Washington have adhered to this view consistently, Washington because of a constitutional provision.

Other courts have held only that such an exaction is not a tax on property. *Featherstone v. Norman*, 170 Ga. 370, 153 S.E. 58, 70 A.L.R. 449; *Ludlow-Saylor Wire Co. v. Wollbrinck*, 275 Mo. 339, 205 S.W. 196; *State ex. rel. Maxwell v. Kent-Coffey Mfg. Co.*, 204 N.C. 365, 168 S.E. 397, 90 A.L.R. 476 (affirmed 291 U.S. 642, 54 S. Ct. 437, 78 L. Ed. 1040); *Welch v. Henry*, 223 Wis. 319, 271 N.W. 68, 109 A.L.R. 508. Perhaps this negative approach—that an income tax is not a property tax—was prompted by the same thought that was imparted by the Supreme Court of Arkansas in the case of *Stanley v. Gates*, 179 Ark. 886, 19 S.W. (2d) 1000:

> "* * * and we deliberately adopted the view that it was not a property tax. If it is not a property tax, it does not make any difference what name it is called. Whether it is called an excise tax, or a tax in the nature of an excise tax, or a personal tax, is a mere matter of definition, and does not in any wise change its character."

There is a discernible trend in the evolution of this branch of the law toward embracing the theory that such tax is not an imposition on property. *New York ex rel. Cohn v. Graves*, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed 666, 108 A.L.R. 721. "The theory which once won qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable." *Graves v. New York*, 306 U. S. 466, 59 S. Ct. 595, 83 L. Ed. 927.

That a tax on income is an excise is a concept which has been gaining momentum. Selected cases so holding are: *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 870, 117 A.L.R. 429; *Diefendorf v. Gallet*, 51 Ida. 619, 10 P. (2d) 307; *Vilas v. Iowa State Board*, 223 Iowa 604, 273 N.W. 338; *Hattiesburg Grocery Co. v. Robertson*, 126 Miss. 34, 88 So. 4, 25 A.L.R. 748; *In re Opinion of the Justices*, 77 N.H. 611, 93 A. 311; *Benua v. City of Columbus*, 78 Oh. L. Abs. 152, 152 N.E. (2d) 550. Some courts prefer to describe the exaction as being one in the nature of an excise tax. *Reynolds Metal Co. v. Martin*, 269 Ky. 378, 107 S.W. (2d) 251; *O'Connell v. State Board*, 95 Mont. 91, 25 P. (2d) 114.

At times courts have classified it as a personal tax. *Miles v. Department of Treasury*, 193 N.E. 855, 97 A.L.R. 1474; *In re Opinion of Justices*, 133 Me. 525, 178 A. 621. And there have been times when a tax on income has been treated as a sui generis — an income tax. *Marshall v. South Carolina Tax Commission*, 178 S.C. 57, 182 S.E. 96; *Moon Co. v. Wisconsin Tax Commission*, 166 Wis. 287, 163 N.W. 639; *Lawrence v. State Tax Commission*, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed 1102, 87 A.L.R. 374.

Next let us consider the nature of a tax on gross income or gross receipts. "Here the charge is measured by gross receipts. This, too, is an occupation or business tax. It has no reference whatever to the amount of property of the company, or its value. It deals with the amount of business done, not with the amount of property owned. Suppose the

company should own no property, but continued business with rented property, on which the owner paid the tax; would it not be liable to this tax on gross receipts? If so, clearly it is not a tax upon property, but is a tax upon occupation or business." *Atlanta Nat. Bldg. & Loan Ass'n v. Stewart*, 109 Ga. 80, 35 S.E. 73.

Such a tax "is both an occupation tax and an income tax." *Sims v. Ahrens*, 557, 271 S.W. 720. The exaction is "in the nature of an excise or license or privilege tax * * *, * * the measure of the tax being gross receipts." *State v. Welch*, 61 S. D. 593, 251 N. W. 189. See *Lincoln Traction Co. v. City of Lincoln*, 84 Nebr. 327, 121 N. W. 435.

Federal courts have been at one with state courts in classifying a tax on gross income as an excise. The gross revenue tax ordained by an Oklahoma statute upon coal miners and producers equal to a specified percentage of the gross receipts from the total coal produced, "which shall be in addition to the taxes levied and collected upon an ad valorem basis," was said to be an occupation or business tax and not a property tax. *Choctaw, O. & G. R. Co. v. Harrison*, 235 U. S. 292, 35 S. Ct. 27, 59 L. Ed. 234. And see *Adams Mfg. Co. v. Storen, supra.*

Does the gradient aspect of the tax in question remove it from the excise category and make it a property tax? The Indiana Gross Income Tax Act of 1933 defined "gross income," inter alia, as "the gross receipts of the taxpayer derived from trades, businesses or commerce, and the gross receipts proceeding or accruing from the sale of property, tangible or intangible, real or personal. . . . " Section 2 of the Act begins: "There is hereby imposed a tax, measured by the amount or volume of gross income, and in the amount to be determined by the application of rates on such gross income as hereafter provided."

In *Miles v. Department of Treasury*, 209 Ind. 172, 199 N.E. 372, 97 A.L.R. 1474, 101 A.L.R. 1359, the Supreme

Court of Indiana adopted the view that such tax was an excise " 'on the recipient of the income, the tax being upon the right or ability to produce, create, receive and enjoy, and not upon specific property.' " In construing the same statute, the Supreme Court of the United States remarked, "* * * the Attorney General says in his brief that it is a privilege tax upon the receipt of gross income. We think this a correct description." *Adams Mfg. Co. v. Storen, supra.* Later, in *Monteith Bros. Co. v. Dept. of Treasury*, 215 Ind. 428, 19 N.E. (2d) 1010, the appellant maintained before the Supreme Court of Indiana that the gross income tax was "an excise or privilege tax," to which that eminent court replied, "This fact is not questioned."

A graduated tax on dividends from which was allowed a single deduction of $750.00 was considered by the Federal Supreme Court in *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121, 83 L. Ed. 87. Throughout the opinion the exaction is treated as an income tax, the tax being "on the receipt of income." Because of the one arbitrary allowable deduction it was held to be a net income tax by the state supreme court, *Welch v. Henry*, 223 Wis. 319, 271 N.W. 68, 109 A.L.R. 508, 226 Wis. 595, 277 N.W. 183, and it would appear that this interpretation was tacitly accepted by the Federal Supreme Court in its decision.

Decisions of this court shed some light on the question. For the privilege of conducting racing under the Racing Act of Colorado, the licensee is required to pay to the Colorado Racing Commission a percentage of the gross receipts of the pari-mutuel wagering at any race meet. In a suit involving the disposition of breakage collected in connection with horse racing, this court in the course of its opinion stated that "The Act before us is in the nature of an excise tax. . . . " *Centennial Turf Club, Inc. v. Colorado Racing Commission*, 129 Colo. 529, 271 P. (2d) 1046. Both a sales tax and a service tax are excise taxes. *Kinn v. Bedford*, 102 Colo. 473, 84 P. (2d) 827.

The distinction between a property tax and an excise tax is often difficult to come by. Ordinarily they are distinguished by the methods employed in laying them and fixing their amount. "Thus, where the tax is imposed directly by the legislature without assessment, and is measured by the extent a privilege is exercised by the taxpayer without regard to the nature or value of his assets, it is an excise; but if the tax be computed upon a valuation of property and assessed by assessors, although a privilege may be included in the valuation, it is a property tax." *Walker v. Bedford*, 93 Colo. 400, 26 P. (2d) 1051.

Of utmost importance to our discourse is the early expositive opinion rendered in *Denver v. Tax Research Bureau*, 101 Colo. 140, 71 P. (2d) 809. By constitutional amendment in 1936 (Article X, Section 17), the General Assembly had been authorized "to levy income taxes, either graduated or proportional, for the support of the state, or any political subdivision thereof, or for public schools, and * * , in the administration of an income tax law, provide for special classified or limited taxation or the exemption of tangible or intangible personal property." The year following the legislature acted under the authority thus bestowed, and the resulting legislation received interpretation in the cited case.

Involved in the suit was the tax exempt status of intangible personal property from ad valorem taxes. As stated by the court, "This act imposed a tax upon net incomes and an additional surtax upon gross income derived from certain specified intangible personal property. Section 39 of the Act provides: 'From and after the effective date of this Act, and notwithstanding any other provision of law, all intangible personal property * * * shall be exempt from ad valorem tax imposed by the State of Colorado, or by any political subdivision thereof; * * * "

Throughout the entire decision there is a strong ponderable thread of thought, that the imposition of taxes on

gross and net incomes is not an ad valorem tax. And throughout the opinion there is a perceptible underlying recognition that exactions on gross and net incomes are the proper subjects of taxation under the constitutional amendment.

This court's awareness in that case of legislation imposing a tax upon net and gross incomes existed by reason of the very controversy confronting it. Said the court: "There is no question that the first taxable year under the new income tax law began on July 1, 1937, and that its provisions imposing taxes on *gross* and *net incomes* are effective from and after that date." (Emphasis supplied.) Again: "An examination of the new *income tax law* clearly discloses that the purpose of the legislature in its adoption was to substitute the income tax on incomes, *net and gross*, imposed by section 2 for all ad valorem taxation on intangible personal property." (Emphasis supplied.) Finally: "If the position of the city was upheld, the owners of specified intangible property for the last half of the year 1937 would be subject not only to the income tax on the *income, net and gross*, realized from intangible personal property, but also the ad valorem tax upon the property itself." (Emphasis supplied.)

Actually, there are decisions symptomatic of the view that the popular notion, that there is a distinction between gross income and net income, has no legal or practical significance. Accordingly, it would appear that we here are dealing with an *income* tax. The greater the number of deductions and exemptions allowable the nearer it approaches net income which forms the base of the exaction; the less the number of deductions and exemptions the nearer it becomes gross income which forms the measure for taxation; they are both income taxes and their difference is but a matter of degree. The importance of this observation becomes apparent when it is realized, as any veteran taxpayer knows from experience, that the kind and amount of

deductions and exemptions sanctioned by a tax law is a matter of governmental grace.

Here are sanctioning words for the concept taken from *New Colonial Ice Co. v. Helvering*, 292 U. S. 435, 54 S. Ct. 788, 78 L. Ed. 1348:

> "The power to tax income . . . . is plain and extends to the gross income. Whether and to what extent deductions shall be allowed depends upon legislative grace; and only as there is clear provision therefor can any particular deduction be allowed."

To the same effect is *Helvering v. Independent Life Insurance Co.*, 292 U. S. 371, 54 S. Ct. 758, 78 L. Ed. 1311. "Under the Sixteenth Amendment all income, whether net or gross, may be taxed by Congress, and the deductions allowed from gross income are given as a matter of grace." *Avery v. Commissioner*, 84 F. (2d) 905.

From the authorities it would appear that both the Federal Supreme Court and this court would consider the tax imposed an excise. Argument of The California Company, that it is a property tax because levied upon gross income on an ascending scale, is not tenable in the light of cited federal decisions and decisions of this court.

It follows that the uniformity of taxation required by Article X, Section 3 of the state constitution does not apply to the excise here under attack, for this "court has consistently held that this constitutional provision refers to the levy of ad valorem taxes upon property and does not apply to taxes imposed upon privileges and occupations." *Jackson v. Glenwood Springs*, 122 Colo. 323, 221 P. (2d) 1083. See *Denver City Railway Co. v. Denver*, 21 Colo. 350, 41 Pac. 826; *American Smelting & Refining Co. v. People*, 34 Colo. 240, 82 Pac. 531; *People v. Denver*, 84 Colo. 576, 272 Pac. 629.

Nor does the Act in question violate Article X, Section

11 of the Colorado constitution. That section provides that "The rate of *taxation on property*, for state purposes, shall never exceed four mills on each dollar of valuation. . . ." (Emphasis supplied.) Such section pertains to a property tax, and has no application to a... se tax. *Rinn v. Bedford, supra.*

We conclude, too, that the Act in question is not a perversion of Section 17, Article X of our constitution, the very amendment under which its passage was sought to be justified. There being allowed a deduction ad valorem taxes described in (f) (2) of the Act, it could with propriety be deemed a net income tax under the above federal citations, particularly *Welch v. Henry, supra;* but above and beyond this, the tax is not inconsonant with Section 17, Article X if we remain consistent and retain the point of view set out in *Denver v. Tax Research Bureau, supra.*

Urged by The California Company is the contention that the title of the Act, quoted above, is insufficient to satisfy the requirements of Section 21, Article V of the constitution. It is the mandate of this constitutional provision that

> "No bill * * * shall be passed containing more than one subject, which shall be clearly expressed in its title. . . ."

Is there a fatal failure in the title of the Act to adequately apprise one of the subject of the legislation and its nature? Is there something occult or deceptive in the title, "An Act relating to revenue and taxation, and to amend Chapter 175, Session Laws of Colorado 1937, as amended by all subsequent acts"?

Considered in its parts, the title has the broad, general, comprehensive subject, "revenue and taxation." Limiting words follow, "and to amend Chapter 175, Session Laws of Colorado 1937, as amended by all subsequent acts." If the act deals with one subject "and the subject is expressed in the title, the constitutional requirement is met. * * *

Particularity is not essential, generality is commendable." *Roark v. People*, 79 Colo. 181, 244 Pac. 909.

The amendment suggested in the title pertains to the state income tax law — a law imposing taxes, as we have seen, on gross and net income. By the amendment there was added a provision for the income tax now under attack. We believe that the content of the Act comes within the purview of the title, and our conclusion in this respect is borne out by the language used by this court in *Wright v. Muehlberg*, 78 Colo. 461, 242 Pac. 634. As we see it, the following has a particular aptness to the present problem:

> "The title of the amendatory act reads, 'An act to amend section 3024 of the Revised Statutes of Colorado of 1908.' The amendment was made by re-enacting the section as a whole and inserting therein the amendatory clause:
>
> > " 'Or negligence consisting of a reckless or wilful disregard of the rights or safety of others.'
>
> "This amendment was germane to the section specified in the title, and we have many times held that this provision of the Constitution is to prevent surprise and deception, through legislation pertaining to one subject under a title relating to another. It is inconceivable how surprise, deception, or fraud could be occasioned by a title to a bill *specifically designating a section of an authorized compilation of the laws of a state, of which every person within the borders of the state is bound to take cognizance.* The law is clearly stated in 1 Lewis' Sutherland, Statutory Construction (2d Ed.) 239:
>
> " 'It is held by the great majority of cases that it is sufficient, for the title of an act to amend a Code or revision, to specify the section to be amended, without giving the title of the chapter or division to which it belongs, or in any way indicating the subject-matter

of the section. Under such a title any legislation is proper which is germane to the section specified.' "

Measured by the language of these authorities, we hold that the title of the Act is not deficient; that it avoids the evils which the constitutional provision has as its object to prevent.

Next we shall take up the contention of The California Company that the tax under scrutiny transgresses the permissible bounds of the due process and equal protection clauses. In this respect the company leans heavily upon the case of *Stewart Dry Goods Co. v. Lewis*, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054 (1934), as vindicating its opposition to the tax. Until the release of the opinion in that case taxation of the character here assailed was considered valid and proper. It was the rationale of previous decisions that the capacity to pay increased generally with an increase in the volume of business, and that classification based thereon was legitimate.

That there was a time when the extent of business afforded a basis for classification in taxation is verified by selected, illustrative decisions. These decisions shall be briefly considered in chronological order.

Under a formula putting in relation gross receipts and number of miles of railroad to determine average receipts per mile, the Supreme Court sanctioned graduated rates in the case of *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217, 12 S. Ct. 121, 35 L. Ed. 994 (1891). The case actually turned on the question of burdening interstate commerce.

We consider next the case of *Clark v. Titusville*, 184 U. S. 329, 22 S. Ct. 382, 46 L. Ed. 569 (1902). Its importance requires extensive quotation, particularly of the court's comments on the key case of *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 18 S. Ct. 594, 42 L. Ed. 1037. Held proper in that case was a tax laid upon merchants. The rate for each class was on a progressive scale

depending upon the amount of gross sales. To the charge that the tax violated the equal protection clause the court said:

> "Classification by amount came up for consideration and decision in *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, and was sustained. That case, plaintiff in error recognizes, may be urged against his contention and attempts to limit its decision to the power of a State over inheritances, and to explain by that power not only the taxes imposed, but the discriminations which were claimed to have resulted from grading the taxes by the amount of the legacy. • • •
>
> "The law of Illinois was charged with inequality of operation because of the classes which it created. It was asserted, as it is in the case at bar, that the classes were formed upon arbitrary differences, and the provisions of the statute which fixed the tax upon legacies to strangers to the blood of the intestate were vigorously assailed. Those provisions were as follows:
>
> " 'On each and every hundred dollars of the clear market value of all property and at the same rate for any less amount on all estates of ten thousand dollars and less, three dollars; on all estates over ten thousand dollars and not exceeding twenty thousand dollars, four dollars: on all estates over twenty thousand dollars and not exceeding fifty thousand dollars, five dollars; and on all estates over fifty thousand dollars, six dollars. Provided, that an estate in the above case, which may be valued at a less sum than five hundred dollars, shall not be subject to any duty or tax.'
>
> "Manifestly, there was inequality between the members of different classes, and that was conceded in the opinion, but as manifestly there was equality between the members of each class, and that equality was held to satisfy the Fourteenth Amendment of the Constitution of the United States; and the reasoning by

which that conclusion was supported is applicable to the case at bar. We met the contention accurately and squarely that there was no reasonable distinction between the classes. We said:

"If there is inequality it must be because the members of a class are arbitrarily made such and burdened as such, upon no distinctions justifying it. This is claimed. It is said that the tax is not in proportion to the amount but varies with the amounts arbitrarily fixed, and hence that an inheritance of $10,000 or less pays 3 per cent, and that one over $10,000 pays not 3 per cent on $10,000 and an increased percentage on the excess over $10,000, but an increased percentage on the $10,000 as well as on the excess, and it is said, as we have seen, that in consequence one who is given a legacy of $10,000 and one dollar by the deduction of the tax receives $99.04 less than one who is given a legacy of $10,000. But neither case can be said to be contrary to the rule of equality of the Fourteenth Amendment. That rule does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money, it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat "all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed." The jurisdiction of courts is fixed by amounts. The right of appeal is. As was said at bar, the Congress of the United States has classified the right of suitors to come into the United States courts by amounts. Regarding these alone, there is the same inequality that is urged against classification of the Illinois law. All

license laws and all specific taxes have in them an element of inequality: nevertheless they are universally imposed, and their illegality [sic] has never been questioned.'"

In *Metropolis Theatre Company v. Chicago*, 228 U. S. 61, 33 S. Ct. 441, 57 L. Ed. 730 (1913), the Supreme Court inquired into the validity of an ordinance which provided for license fees graded according to the price of admission charged spectators of entertainment. It was determined that equal protection was not denied by such an exaction. The classification was upheld as not being arbitrary or unreasonable, even though some of the theaters charging the higher admission could show less gross revenue than those charging a smaller sum for admission and accordingly paid lower license fees.

An additional tax setting up a scandent scale according to the number of cases of fish products packed was said not to thwart the Federal 14th Amendment. "The inequalities of the tax are based upon intelligible grounds of policy and cannot be said to deny the petitioner its constitutional rights." *Pacific American Fisheries v. Alaska*, 269 U. S. 269, 46 S. Ct. 110, 70 L. Ed. 270 (1925).

A chain store tax establishing rates in increasing progression with the number of stores under the same general management, supervision or ownership was held not repugnant to the equal protection clause in the celebrated case of *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 51 S. Ct. 540, 75 L. Ed. 1248, 73 A.L.R. 1464 (1931).

Stewart Dry Good Co. v. Lewis, 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054 (1934) was hailed as the herald of a new day in the field of state taxation. The Supreme Court held invalid a Kentucky statute imposing a graduated tax measured by the amount of gross sales. It was the opinion of the majority of the court that it could not be justified as an excise on the privilege of merchandising,

because there was no reasonable relation between the amount of the tax and the value of the privilege, and no reasonable relation between gross sales and net profits as would justify the classification.

Denunciation of the Act was unequivocal:

"* * * The Act does not impose an income or profits tax, or a license tax, is not an inspection measure, or a police regulation. The tax is not confined to a particular method of merchandising. All retailers, individual and corporate, selling every description of commodities, in whatever form their enterprises are conducted, make up the taxable class. And the excise is laid in respect of the same activity of each of them — the making of a sale. Although no difference is suggested, so far as concerns the transaction which is the occasion of the tax, between the taxpayer's first sale of the year and his thousandth, different rates may apply to them. The statute operates to take as the tax a percentage of each dollar due or paid upon every sale, but increases the percentage if the sale which is the occasion of the tax succeeds the consummation of other sales of a specified aggregate amount. As found by the court below, the act of making a sale, which with all others made in the taxable year represents a total sales price of $400,000 or less, results in the imposition of a tax of 1 20th of one per cent. upon the price, whereas the making of the same sale by one who has theretofore sold $400,000 but less than $500,000 worth of goods entails a tax of 2 20ths of one per cent., or by one whose prior sales aggregate $900,000, a tax of 17 20ths of one per cent. * * *

"Thus understood, the operation of the statute is unjustifiably unequal, whimsical and arbitrary, as much so as would be a tax on tangible personal property, say cattle, stepped up in rate on each additional animal owned by the taxpayer, or a tax on land simi-

larly graduated according to the number of parcels owned."

In the course of the opinion the majority sought to distinguish the case of *Clark v. Titusville, supra*, to show that the law therein was not controlling of the case then before it. Then in 1936 the challenge to the Iowa chain store tax was resolved upon the authority of *Stewart Dry Goods Co. v. Lewis, supra*. Taxes were imposed upon stores both on the basis of the number of stores and on the gross receipts taken in by them. Both of the exactions were based upon graduated formulae. In *Great Atlantic & Pac. Tea Co. v. Valentine*, 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22 (1936), the gross receipts phase of the statute was struck down.

These two decisions provoked a profusion of text-writing dissent. With unanimity authors of law review articles agreed with the dissenters in the Stewart case, and a number of them believed there was no basis for reconciliation between *Clark v. Titusville, supra*, and *Stewart Dry Goods Co. v. Lewis, supra*. 35 Columbia Law Rev. 606; 48 Harvard Law Rev. 1434; 21 Iowa Law Rev. 93; "Constitutional Limitations on Progressive Taxation of Gross Income," by Robert C. Brown, 22 Iowa Law Rev. 246; 33 Mich. Law Rev. 1278; 20 Minn. Law Rev. 88; 9 So. Calif. Law Rev. 167 are typical of the critical views expressed by authors of articles on *Stewart Dry Goods Co. v. Lewis*.

Decisions of the Federal Supreme Court following the Stewart and Valentine cases have rendered opaque that which could have been considered crystal clear by the pronouncements of those two cases. Justice Roberts, the author of the Stewart majority opinion, wrote the opinion of the majority in *Great Atlantic & Pac. Tea Company v. Grosjean*, 301 U. S. 412, 57 S. Ct. 772, 81 L. Ed. 1193, 112 A.L.R. 293 (May, 1937). He rejected the argument of the dissenters, based in great part on the philosophy of the Stewart decision.

Involved in the Grosjean case was a state statute which imposed a chain store tax graduated according to a formula classifying stores as to numbers under the same general management or ownership, whether operated in the "state or not." It was decided that equal protection was not impinged, the court rejecting the argument "that in adjusting the rate for a chain store in Louisiana the legislature may not take into account the size of the chain to which the store belongs, by counting the total number of its units wherever located. So to do, it is claimed, is arbitrarily to discriminate against sectional or national chains in favor of intrastate chains."

Later in the year 1937 in *Rapid Transit Corp. v. New York*, 303 U. S. 573, 58 S. Ct. 721, 82 L. Ed. 1024, the court held the Stewart case to be inapplicable to a flat gross income tax, and in the course of the opinion sought to show the limited application of the opinion in that case. At the same time it seemed to resuscitate the doctrine of *Clark v. Titusville*, saying approvingly that "we rejected an equal protection objection to a license tax on merchants, which we said was 'a tax on the privilege of doing business regulated by the amount of sales, and . . . . not repugnant to the Constitution of the United States.' And we have heretofore had occasion to remark that gross receipts from an occupation constitute an 'appropriate measure of the privilege' of engaging in that occupation."

Adding to the difficulty of the problem is the case of *Welch v. Henry, supra* (1938). A graduated tax on gross income less an arbitrary deduction of $750.00 was sanctioned by the Supreme Court. Not mentioned by the court, but urged by the appellant as invalidating the tax statute, is the case of *Stewart Dry Goods Co. v. Lewis, supra*. Language in the opinion strongly suggests that the Supreme Court considered the imposition a net income tax, probably because of the provision for the one deduction.

Are decisions subsequent to the Stewart case, and a few

state decisions hereinafter discussed straws in the wind? Are there indications that the Stewart minority opinion would be adopted if the Federal Supreme Court could entertain anew the question? The State of Colorado in the instant case assiduously advocates the likelihood of a change of philosophy by reason of the evolution of the law and the difference in cast composing the highest court of the land at this time.

The City of Paducah, Kentucky, enacted an ordinance in 1947, imposing a tax in an ascending scale based upon the volume of gross receipts of the trade or occupation. Validity of the tax was tested in *Paducah Automotive Trades Ass'n v. City of Paducah*, 307 Ky. 524, 211 S.W. (2d) 660 (1948), partly upon the authority of *Stewart Dry Goods Co. v. Lewis*. In the course of the opinion the Supreme Court of Kentucky vouchsafed that if the former Kentucky statute were submitted later than it was or to the then present Supreme Court, its decision would have validated the tax. The Kentucky court held that the minority opinion in the Stewart case stated the correct law. It concluded that the ordinance was valid.

As late as 1956, in the case of *Mississippi v. Paramount-Gulf Theatres*, 226 Miss. 404, 84 So. (2d) 403, the impact of *Stewart Dry Goods Co. v. Lewis, supra*, was blunted. "The statute in question places a two percent tax on each dollar of gross revenue derived from the sale of admission to any picture show operating in the State. It then classifies operators of more than ten picture shows belonging to a single chain or group into a separate class and levies on such chain operators an additional three percent tax on each dollar of gross revenue derived from the sale of admissions to any such moving picture show 'belonging to a chain or group having a total of more than ten (10) such moving picture shows wherever situated so that the total tax on such moving picture shows belonging to such chain or group shall be five (5%) on each dollar of gross revenue so derived * * * .'"

The Supreme Court of Mississippi refused to apply the Stewart doctrine — in fact, held that it was distinguishable from the controversy before it.

Colorado has an analogue in *Jackson v. Glenwood Springs*, 122 Colo. 323, 221 P. (2d) 1083, in which this court upheld an ordinance providing for a graduated tax using as the basis of progression the number of employees in each establishment. In repudiating the contentions that the ordinance violated the equal protection clause, that it was arbitrary and capricious in the classifications formulated, this court resorted to *Clark v. Titusville, supra*, as supporting authority.

For this court to declare the act violative of federal equal protection, it must be convinced beyond a reasonable doubt that the Act does so violate. *Mosko v. Dunbar*, 135 Colo. 172, 309 P. (2d) 581. And where the Supreme Court of the United States has spoken on the subject, we have no choice but to heed and obey its words. *Mosko v. Dunbar, supra; Pueblo Building and Const. Trades Council v. Harper Const. Co.*, 134 Colo. 469, 307 P. (2d) 468. There are intimations in the federal decisions that a tax such as this does not offend the Fourteenth Amendment.

By C.R.S. '53, 138-1-7(5) (Ch. 131, Sec. 2, Colo. Sess. Laws 1953, supra) the tax is denominated "to be a special classified and limited tax. . . . " Be it remembered that it was said that "all license laws and *specific taxes* have an element of inequality; nevertheless they are universally imposed, and their illegality [sic] has never been questioned." *Clark v. Titusville, supra.* (Emphasis supplied.)

The tax is imposed "upon that portion of the gross income of every person which is derived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state" at progressive rates. C.R.S. '53, 138-1-7. Such a tax is an excise upon the privilege of producing or extract-

ing within the state, measured by the amount of sales. *American Mfg. Co. v. St. Louis*, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084; *Oliver Iron Min. Co. v. Lord*, 262 U. S. 172, 43 S. Ct. 526, 67 L. Ed. 929.

It might be said to come within the differentiating expression indicating other disposition of *Stewart Dry Goods Co. v. Lewis, supra*, had the factor been present, i.e., "The tax is not confined to a particular method of merchandising." Again, it was suggested in the Stewart opinion that if one type of operation made up "the taxable class," validity might attend.

Finally, should the credits allowed by the Act to be applied against the gross income constitute the instant tax a net income tax within the decisions of *Welch v. Henry, supra*, we have another reason for not declaring the Act incompatible with the equal protection clause.

Considerable stress has been laid on the purport and the effect of the tax as burdening interstate commerce. In its brief The California Company advocates that "As applied to the proceeds realized by plaintiff from the greater portion of its oil production in 1953, the imposition of the tax on such proceeds or income constitutes an unreasonable burden upon interstate commerce provisions of Section 8, Article 1, of the Constitution of the United States."

"It would be a Herculean, if not impossible task, to review and harmonize the myriad decisions of the Supreme Court of the United States on the subject of interstate commerce and exactly what incidents thereof may be constitutionally taxed by the States." *Roy Stone Transfer Corp. v. Messner*, 377 Pa. 234, 103 A. (2d) 700. Justice Clark in the very recent case of *Portland Cement Co. v. Minnesota*, 358 U. S. 450, 79 S. Ct. 357, 3 L. Ed. (2d) 1292, 67 A.L.R. (2d) 1292, noted that the Federal Supreme Court "alone has handed down some three hundred full-dress opinions. . . ."

Justice Clark was not given to understatement when he said in the same case

> "That there is a 'need for clearing up the tangled underbrush of past cases' with reference to the taxing power of the States is a concomitant to the negative approach resulting from a case-by-case resolution of 'the extremely limited restrictions that the Constitution places upon the states. . . .' * * * Commerce between the States having grown up like Topsy, the Congress meanwhile not having undertaken to regulate taxation of it, and the States having understandably persisted in their efforts to get some return for the substantial benefits they have afforded it, there is little wonder that there has been no end of cases testing out state tax levies. The resulting judicial application of constitutional principles to specific state statutes *leaves much room for controversy* and confusion and little in the way of precise guides to the States in the exercise of their indispensable power of taxation." (Emphasis supplied.)

Adverting to the instant case, the trial court found "no evidence * * * showing that the tax constitutes an unreasonable burden on commerce as a factual matter." In its findings the trial court further recited:

> "The production and marketing procedure is substantially as follows:
>
> "Oil and gas reach the surface (referred to in the testimony as the 'well head') as a homogeneous mass; and, of physical necessity, if oil is brought to the surface, gas is mixed with it. (However, as will be mentioned in more detail later herein, as the rate of production of oil increases, the rate of production of gas increases in more rapid progression.)
>
> "After the admixed oil and gas reach the well head, the mixture flows by pipe (owned by the Cali-

fornia Company) to a 'separator.' The separator processes the mixture to remove most of the gas from the oil. The oil then flows by pipe (owned by the California Company) to a 'heater-treater' where the remainder of the gas is removed from the oil. From the heater-treater, the oil is transported by pipe (owned by the California Company) to 'lease tanks' (owned by the California Company) in which the oil is temporarily stored and is gauged or measured. To this point, the oil has not left the lease site or its immediate vicinity, and it is the sole property of the producer — the California Company.

"The lease tanks are connected to an interstate pipeline operated as a common carrier, and, at the instant the oil leaves the lease tanks, it starts its journey in interstate commerce. The California Company does not own and it has no interest in the interstate pipeline. To the contrary, that pipeline is owned and operated by a separate corporation.

"The California Company retains title to and retains all of the increments of ownership of the oil up to the point in the production process that the oil leaves the lease tanks, but, by contract, title and all increments of ownership pass to a purchaser at the instant the oil leaves the lease tanks and enters the interstate pipeline. The California Company itself sends no oil owned by it through the pipeline. Instead, all of the oil it produces in the State of Colorado is sold to other corporations — that is, to Standard Oil Company of California, Western States Refining Company and Uinta Oil Refining Company, all of which are corporations entirely separate and distinct from plaintiff and entirely separate and distinct from the pipeline company — and these sales are fully consummated when the oil leaves the lease tanks. At that instant, the purchaser's firm obligation to pay for the oil

comes into being, and all risk of loss is on the purchaser.

"The evidence shows that although the California Company is part of the corporate chain of Standard Oil Company of California, the California Company is a separate corporation; and, at least as to all oil it produces in Colorado, the company acts only as a producer and not as a marketing company. The total interest of the California Company in all oil it produces in Colorado ceases, after the oil has been produced and twice processed by the company but long before the oil leaves the State of Colorado."

It thus appears that The California Company extracts a natural resource from the earthy depths of Colorado, processes the material here, and delivers the product from its tanks into a pipe line located in Colorado where the product starts its interstate journey. The delivery into the pipe line is pursuant to contract between The California Company and Standard Oil Company:

"Crude oil sold under this agreement shall be delivered for Buyer's account to the pipe lines connected to Seller's lease and fee storage tanks in the Rangely Field for interstate shipment. Title to crude oil thus delivered shall pass to Buyer when the oil passes the outlet valves of such storage tanks."

We remind ourselves that the exaction is on "the gross income of every person which is derived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state. . . ." The tax is not on sales; and there is no tax unless there is a severance of the natural resource from the soil. The incidence of the tax is not on the sale of the processed material; it is on gross receipts derived from the withdrawal of raw materials from the soil of Colorado.

A tax on the value of ore mined or produced was at-

tacked as a property tax burdening interstate commerce in *Oliver Iron Co. v. Lord, supra.* The court observed: "Obviously a tax laid on those who are engaged in that business, and laid on them solely because they are so engaged, as is the case here, is an occupation tax. It does not differ materially from a tax on those who engage in manufacturing."

There is a parallel factually between the cited case and the case presently being considered. Note:

> "The facts on which the contention rests are as follows: The demand or market within the State for iron ore covers only a negligible percentage of what is mined by the plaintiffs. Practically all of their output is mined to fill existing contracts with consumers outside the State and passes at once into the channels of interstate commerce. Three-fourths of it is from open pit mines and one-fourth from underground mines. At the open pit mines empty cars are run from adjacent railroad yards into the mines and there loaded. Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. The operations within the mine and the movement of the cars into and out of the mine are conducted by the plaintiffs. The subsequent transportation is by public carriers. At the underground mines the plaintiffs dig the ore, bring it to the surface through shafts and put it in elevated pockets where it readily can be loaded into cars. The subsequent movements are much the same as at the open pit mines, but their continuity is not so pronounced. Some of the ore from both kinds of mines — between 10 and 20 per cent. — is concentrated by washing or beneficiated after coming out of

the mine and before starting out of the State, but our conclusion respecting the usual operations renders this deflection immaterial.

"Plainly the facts do not support the contention. Mining is not interstate commerce, but, like manufacturing, is a local business subject to local regulation and taxation. * * * "

If the extraction of oil and gas may be likened to manufacturing, as suggested in the Oliver Iron Co. case, then *American Mfg. Co. v. St. Louis, supra*, is helpful in resolving our problem. St. Louis enacted an ordinance requiring every manufacturer to take out a license and to pay a tax of a certain amount on the aggregate amount of sales made by him during the year. "The tax," said the court, "is computed according to the amount of the sales of such manufactured goods, irrespective of whether they be sold within or without the State, in one kind of commerce or another; and payment of the tax is not made a condition of selling goods in interstate or in other commerce, but only of continuing the manufacture of goods in the City of St. Louis."

Of particular pertinence is the following language of the court:

"* * * In the outcome the tax is the same in amount as if it were measured by the sale value of the goods but imposed upon the completion of their manufacture. The difference is that, for reasons of practical benefit to the taxpayer, the city has postponed payment until convenient means have been furnished through the marketing of the goods.

"In our opinion, the operation and effect of the taxing ordinance are to impose a legitimate burden upon the business of carrying on the manufacture of goods in the city; it produces no direct burden on commerce in the goods manufactured, whether domestic or

interstate, and only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government. Therefore, it does not amount to a regulation of interstate commerce. And, for like reasons, it has not the effect of imposing a tax upon the property or the business transactions of plaintiff in error outside of the State of Missouri, and hence does not deprive plaintiff in error of its property without due process of law."

Both sides seek vindication of their positions in the case of *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 74 S. Ct. 346, 98 L. Ed. 583. Texas imposed a tax on the occupation of "gathering gas," measured by the entire volume of gas "taken." It was held an infringement of the commerce clause as applied to an interstate gas pipe line company, where the taxable incidence was the taking of gas from the outlet of an independent gasoline plant within the state for the purpose of immediate interstate transmission. That The California Company can get no solace out of the case appears from this language:

"* * * Cited to support this principle was *Oliver Iron Mining Co. v. Lord*, 262 U. S. 172 (1923), where a state tax levied on all 'engaged in the business of mining or producing iron ore or other ores' was upheld since the 'ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining' (at 179); and *Hope Natural Gas Co. v. Hall*, *supra*, which upheld a tax on 'producers of natural gas reckoned according to the value of that commodity at the well.' But the tax here is not levied on the capture or production of the gas, but rather on its taking into interstate commerce *after* production, gathering and processing."

The quotation from the opinion in *Michigan-Wisconsin Pipe Line Co. v. Calvert*, *supra*, clearly indicates that

if the excise under present attack had been placed upon Standard Oil Company, the latter could have asserted with propriety that interstate commerce was burdened. However, the implication is just as clear that the activity of The California Company does not bring the levy against it within the protection of the interstate commerce clause.

Interstate commerce is not generally burdened by a state income tax. Courts have upheld income taxes against charges that they constitute a burden on commerce. *Portland Cement Co. v. Minnesota, supra.* Since there is reason to believe that the present tax is a net income tax in view of the decision in *Welch v. Henry, supra*, we find no burden here.

We conclude:

(1) This is not a tax on interstate commerce or gross receipts derived therefrom. It is an excise upon the gross receipts derived from the extraction of certain raw materials from the bowels of the earth in Colorado.

(2) It is a tax visited upon a local activity that cannot again become subject to another duplicating tax — the activity cannot be the object of multiple state taxation. Production and extraction, an integral part of the structure of the tax here created, takes place only once; hence, interstate commerce could not be involved.

(3) Such production is essentially a mining operation and therefore is not a part of interstate commerce even though after processing the product is to be shipped in interstate commerce pursuant to a contract for its purchase. Such activity is a local function subject to taxation, and the matter and measure of the tax is gross receipts derived from such production.

Should the Act receive a retrospective construction? The Director of Revenue construed it as legislation working retrospectively. A portion of the total tax covers the months of January, February, through March 27, 1953,

on which day the revenue measure in question was approved by the Governor. It is the contention of The California Company that the construction of the measure by the State of Colorado compelling payment for the period prior to the approval of the Act constitutes a retrospective operation incontravention of Sectior 11, Article II of the Colorado constitution. The California Company also contends that if the revenue measure does by word operate retrospectively, it is invalid.

Section 1 of the Act provides that the tax shall be levied, collected and paid "for each taxable year ending on and after December 31, 1953." The only other provision in the Act fixing time is that which requires every producer from and after May 1, 1953 to withhold from royalty payments a certain percentage and to make periodic reports and payments thereafter of the amounts so withheld.

It is urged by the State of Colorado that the "taxable year" refers to the "taxable year" of the general income tax law of which the present tax constitutes an amendment. Further, the State contends that the taxable year began January 1, 1953, and that retrospectivity here does not render the law vulnerable to assault on the ground that the General Assembly is forbidden to enact a law which shall be "retrospective in its operation."

It is a fundamental rule "that all statutes shall be construed prospectively unless a contrary intention is clearly manifest." *Curtis v. McCall, Judge*, 79 Colo. 122, 244 Pac. 70; *French v. Deane*, 19 Colo. 504, 36 Pac. 609, 24 L.R.A. 387.

We are not disposed to hold that there is a clear intention on the part of the legislature to make the exaction work retroactively. Indeed, a very serious question of constitutionality would arise if the revenue measure was construed to mean that it worked retrospectively. It has been said that a retrospective law "embraces a statute which

abrogates an existing right of action or defense, or creates a new obligation on transactions or considerations already past." *Evans v. Denver*, 26 Colo. 193, 57 P. 696.

Finally, in respect to the order entered by the trial court for an accounting, it appears that the determination of the amount of the tax, payment under protest, the accuracy of the amount of the tax, whether there was error in any computations, are administrative problems. C.R.S. '53, 138-1-35, creates administrative machinery for determining tax liability, and this was followed in this case, at the conclusion of which the tax liability determined thereby was paid under protest. Apparently the decision of the Director of Revenue is final against the State, for 138-1-36 makes available only the remedy to be pursued in the event the taxpayer is dissatisfied with the Director's decision.

In view of what has been said, the judgment must be and is affirmed in all respects except as to the retrospective application of the law and the direction for an accounting. The starting date of the tax is March 27, 1953, and the judgment of the trial court should be amended to so show. Since the direction for an accounting is improper, the order therefor should be stricken from the trial court's order.

MR. JUSTICE MOORE concurring in the result.

MR. JUSTICE HALL dissenting.

NO. 18652—THE CALIFORNIA COMPANY V. STATE OF COLORADO, ET AL.

MR. JUSTICE HALL dissenting:

I respectfully dissent from the majority opinion.

The tax under attack, though labeled as a tax on "gross income," is in my opinion a tax on property, an ad valorem tax, not an income tax. The majority opinion holds to the contrary and concedes that if it were an ad valorem tax it would be unconstitutional.

Oil and gas, coal, gold, silver and other metals are all a part of the realty, placed there by nature, and once severed are not replenished by nature. To call the proceeds derived from the severance and disposition of such realty (realty which is gone forever) income, and subject to tax as income, is at variance with the common meaning of that word.

On removal and sale of a barrel of oil from land the land owner has more money, but less oil. Similarly, when a ton of coal is severed from the realty and brought to the surface, the land owner has the same amount of coal as before the severance, though it has been converted into personalty and its value enhanced by reason of its extraction and being made available and suitable for consumption. Such efforts may result in profits or losses, but I am unable to see by what process of reasoning gross proceeds from the sale of the finished product can be considered as income.

In my opinion the legislature, in allowing as a credit against the amount of gross income tax due

> "* * * * the sum of all *ad valorem taxes* levied, assessed and paid during the taxable year upon crude oil, natural gas, oil and gas leaseholds and leasehold interests, and oil and gas royalties and royalty interests for *state, county, municipal, school district* and special district purposes * * *,"

necessarily recognizes the tax as an ad valorem tax. There is no way of determining the amount of tax remaining due and collectible without knowing the amount of the ad valorem taxes assessed and paid. The two different taxes, if they are different, are inextricably interwoven, and, as I view it, are simply two ad valorem taxes against the same property in contravention of both state and federal constitutional inhibitions.

Along the same line of reasoning, I am of the opinion that this tax deprives the owners of gas and oil lands of the

equal provisions of the Federal Constitution. To illustrate, let us take "A", an owner of lands proven to contain valuable deposits of oil and gas; "B", an owner of lands proven to contain valuable deposits of coal, and "C", an owner of lands proven to contain valuable deposits of "gold, silver, lead, copper, or other precious or valuable minerals." Each property is subject to ad valorem taxes imposed by the county in which the property is located. These taxes are all based on assessments on the full cash value of the properties and they are equal and uniform. Assuming that "A" owns forty acres of oil land; "B" forty acres of coal land, and "C" forty acres of gold land, and that during a period of, say, ten years each forty acres is depleted of its minerals. Each must pay the ad valorem taxes assessed annually on the full cash value of the lands. If 10% of the minerals are extracted each year, then the assessed valuation should be reduced 10% each year. At the end of the ten-year period there would be no more ad valorem taxes based on mineral valuation. "A" would have paid the same ad valorem tax as "B" and "C", and in addition, being the owner of oil lands, would have paid a graduated percentage of gross revenues derived from the sale of the realty. "B" and "C" would pay only the ad valorem tax. Such methods of taxation do not afford "A", "B" and "C" equal protection. To single out owners of oil while exempting owners of coal and gold and silver, all of whom occupy identical positions, cannot be called equal or uniform. Rather, the treatment given "A" is arbitrary, capricious and very unequal indeed. Understandably, the legislature, in quest of urgently needed revenue, chose the oil industry, beneficiaries of a depletion allowance, supposedly rolling in wealth, rather than the depressed and nonprofitable coal and metal mining industries, as the most likely and easily tapped source of revenue. Such selectivity *does not*, possibly I should say *should not, find sanction in our system of government.*

Our system of government does not sanction nor permit

special laws, but rather calls for general laws that affect all, or at least some reasonably selected segment, of the people alike.

Here the tax is imposed only upon the production of oil and gas. Those producing coal, gold, silver and other natural resources, nonreplenishing, are in identically the same position as those producing oil and gas, but their tax treatment as provided by the statute in question is so different, and the purported classification so nebulous, that one must conclude that the plaintiff is not afforded equal protection of the laws of the state of Colorado, as is guaranteed by the Fourteenth Amendment to the Constitution of the United States of America.

The judgment should be reversed.

December 21, 1959, Judgment—Colorado Supreme Court

The California Company, a corporation, 18652 *Plaintiff in Error,*		
State of Colorado; Robert A. Theobald, as Director of Revenue of the State of Colorado; Homer F. Bedford, as Treasurer of the State of Colorado, *Defendants in Error.*		Error to the District Court of the City and County of Denver.

This cause having been brought to this court by writ of error to review the judgment of the District Court of the City and County of Denver, and having been heretofore argued by counsel and submitted to the consideration and judgment of the court upon the matters assigned as constituting error in the proceedings and judgment of said Court, the court now being sufficiently advised in the premises, it is therefore ordered and adjudged that the judgment of said District Court be, and the same is hereby affirmed in part and reversed in part in conformity with the conclusions announced in the opinion of the court filed herein, and this cause be remanded to said District Court for further proceedings in harmony with the opinion of the court on file.

FEBRUARY 15, 1958, JUDGMENT DISTRICT COURT—CITY AND COUNTY OF DENVER

THE CALIFORNIA COMPANY, a corporation,

vs.

STATE OF COLORADO; EARL BLEVINS, as Director of Revenue of the State of Colorado; EARL E. EWING, as Treasurer of the State of Colorado,

No. B-3709

JUDGMENT OF DISMISSAL

The Court having this day ordered that judgment of dismissal of plaintiff's complaint be entered in favor of the defendants and against the plaintiff, in accordance with the written Memorandum Opinion, Findings of Fact, Conclusions of Law, Determination under Rule 54, and Judgment, NOW THEREFORE

IT IS ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff's complaint be, and hereby is, dismissed; and that the said defendants go hence hereof, and have and recover of and from the said plaintiff, The California Company, a corporation, their costs in this behalf laid out and expended, to be taxed; and have execution therefor.

APPENDIX B

Chapter 131, Colorado Session Laws 1953
Colorado graduated gross income tax on proceeds from oil and gas production

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"AN ACT

"Relating to Revenue and Taxation, and to Amend Chapter 175, Session Laws of Colorado, 1937, as amended by all subsequent Acts.

"Be it enacted by the General Assembly of the State of Colorado:

"Section 1. Section 2 of Chapter 175, Session Laws of Colorado, 1937, as amended, is hereby further amended by adding a new subsection (f), reading as follows:

"'(f) (1). In addition to the tax imposed by subsections (a), (b), (c) and (d) of this section, there shall be levied, collected and paid for each taxable year ending on and after December 31, 1953, upon that portion of the gross income of every person which is derived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state a tax at the following rates:

Under $25,000	2%
$ 25,000 and under $100,000	3%
$100,000 and under $300,000	4%
$300,000 and over	5%

"For the purposes of this subsection (f) (1), the words 'gross income derived from the production or extraction

of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state' means the entire amount realized from the sale or other disposition of all crude oil and natural gas produced or extracted during any taxable year from petroleum deposits located within this state.

"(2) There shall be allowed as a credit against the tax computed in accordance with the provisions of paragraph (1) of this subsection (f) an amount equivalent to the sum of all ad valorem taxes levied, assessed and paid during the taxable year upon crude oil, natural gas, oil and gas leaseholds and leasehold interests, and oil and gas royalties and royalty interests for state, county, municipal, school district and special district purposes, except such ad valorem taxes as may be levied, assessed and paid for such purposes upon equipment and facilities used in drilling for, production of, storage of, and pipeline transportation of crude oil and natural gas. Receipts evidencing payment during the taxable year of such ad valorem taxes to the treasurers of the several counties of this state shall be prima facie evidence for the allowance of the credit hereby allowed, provided, however, that the Director of Revenue may require such additional evidence as he may deem necessary for the purpose.

"(3) Every person subject to taxation under the provisions of this subsection (f) shall make an annual return to the Department of Revenue, separate and apart from other returns required to be made under the provisions of this chapter, upon a form to be prescribed by the Director of Revenue, which return shall be filed with the Department on or before the fifteenth day of the fourth month following the end of the taxable year, and shall make payment of the tax shown to be due at the time such return is filed.

"(4) From and after May 1, 1953, every producer, which term is hereby defined to mean every person producing or extracting crude oil, natural gas, or both crude oil

and natural gas from petroleum deposits located within this state, or every first purchaser of crude oil, natural gas, or both crude oil and natural gas produced or extracted from petroleum deposits located within this state, as the case may be, shall withhold from every royalty payment made to any person claiming or having an interest in any oil or natural gas so produced, except from royalty payments made to the United States of America or the State of Colorado, an amount equal to 3% of such royalty payment, and shall pay to the Department of Revenue, on or before the fifteenth day of October, 1953 the aggregate amount of all such withholdings made during the months of May, June, July, August and September of 1953, and shall on or before the fifteenth day of January, April, July and October in each year thereafter pay to the Department of Revenue the aggregate of all such withholdings made during the three preceding months, and shall upon the dates aforesaid file reports covering such withholdings upon forms to be prescribed by the Director of Revenue; provided, however, that nothing contained herein shall be so construed as to reduce the tax imposed by subsection (f) (1) hereof.

"Every person making a return as required in subsection (f) (3) hereof may take credit for the amount withheld by the producer or the first purchaser against the tax shown to be due upon such return, and any overpayment shown on such return shall be refunded to the taxpayer.

"Section 2. The tax hereby imposed is declared to be a special classified and limited tax in accordance with the provisions of Section 17 of Article X of the constitution of the State of Colorado.

"Section 3. This Act shall be administered by the Director of Revenue, pursuant to and in accordance with the applicable provisions of Chapter 175, Session Laws of Colorado, 1937, as amended by all subsequent Acts.

"Section 4. If any provision of this Act, or the application thereof to any person or circumstances, shall be held

invalid, such invalidity shall not affect other provisions or applications of this Act, and to this and the provisions of this Act are declared severable.

"Section 5. The General Assembly hereby finds, determines and declares that this Act is necessary for the immediate preservation of the public peace, health and safety."

(Approved: March 27, 1953)

Note: Chapter 175, Colorado Session Laws, 1937, as amended, appears as Chapter 138, Colorado Revised Statutes, 1953. Sections 1 and 2 of the above 1953 Act are incorporated in Chapter 138, Colorado Revised Statutes, 1953, as Section 138-1-7. In Colorado Revised Statutes, 1953, "subsections (a), (b), (c) and (d) are changed to read "Sections 138-1-2 to 138-1-5".

COLORADO REVISED STATUTES 1953
(Net Income Tax Act)

"138-1-1. Definitions.—When used in this article:

"(1) The term 'taxpayer' means any person subject to the tax imposed by this article.

"(2) The term 'fiduciary' means a guardian, trustee, executor, administrator, receiver, conservator, or any person acting in any fiduciary capacity for any person.

"(3) The term 'person' includes an individual, an estate or trust, a partnership, or a corporation.

"(4) The term 'partnership' includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this article, a trust or estate or a corporation; and the term 'partner' includes a member in such syndicate, group, pool, joint venture or organization.

"(5) The term 'co-operative' means a company, corporation or association which authorizes the distribution of its earnings, in part or wholly, on the basis of or in proportion to the amount of property bought from or sold to members, or to members and other customers, or of labor performed, or other service rendered to the corporation.

"(6) The term 'corporation' includes joint stock companies or associations, savings and loan associations, credit unions, and co-operatives, but does not include municipal or public corporations.

"(7) The term 'member of a co-operative' means an actual member of a co-operative organized without capital stock or a holder of common stock in an association organized with capital stock.

"(8) The term 'taxable year' means the calendar year or the fiscal year ending during such calendar year upon the basis of which the net income is computed under the provisions of this article and includes, in the case of a return made for a fractional part of a year, the period for which such return is made.

"(9) The term 'fiscal year' means an accounting period of twelve months ending on the last day of any month other than December.

"(10) The word 'paid' means 'paid or incurred' or 'paid or accrued' and shall be construed in accordance with the method of accounting used as a basis for computing net income under this article.

"(11) The word 'resident' applies to natural persons, including only natural persons domiciled in this state, and others who maintain a permanent place of abode within this state, spending, in the aggregate, more than six months of the taxable year within this state; provided, that this definition shall not be construed to conflict with the provisions of sections 138-1-52 to 138-1-60, relating to taxation of nonresidents of the state of Colorado.

"(12) The terms 'includes' and 'including' when used in a definition contained in this article shall not be deemed to exclude things otherwise within the meaning of the term defined.

"(13) The term 'basic date' means July 1, 1937.

"(14) The term 'assessment' means the filing of the return as to the tax and penalty shown to be due thereon, and, as to any other tax imposed under this article, or any deficiency in tax, or any penalty, means the mailing or issuance of a notice and demand for payment."

"138-1-2. Individuals.—(1) There shall be levied, collected and paid for each taxable year upon the net income of every individual resident of this state and upon the net income of every individual nonresident which is derived from sources within this state, a tax at the following rates upon the net income in excess of the credits and exemptions against net income as hereinafter provided:

NET INCOME	PER CENT
Under $1,000.00	1
$ 1,000.00 and under $ 2,000.00	1½
$ 2,000.00 and under $ 3,000.00	2
$ 3,000.00 and under $ 4,000.00	2½
$ 4,000.00 and under $ 5,000.00	3
$ 5,000.00 and under $ 6,000.00	4
$ 6,000.00 and under $ 7,000.00	5
$ 7,000.00 and under $ 8,000.00	6
$ 8,000.00 and under $ 9,000.00	7
$ 9,000.00 and under $10,000.00	8
$10,000.00 and under $11,000.00	9
All over $11,000.00	10

"(2) For one taxable year only, that being the calendar year of 1953 or a fiscal year beginning during the year 1953, there shall be allowed as a credit against the tax

computed in accordance with the above income tax brackets and rates, an amount equivalent to twenty per cent of the net tax so computed. In the case where credit for taxes paid to another state is taken, the twenty per cent credit herein provided shall apply to the resultant tax after the credit as provided in section 138-1-41 has been taken.

"(3) In addition to the tax imposed upon net income, there shall be levied, collected and paid, for each taxable year beginning after December 31, 1950, upon the gross income of every natural person who is a resident of this state, a surtax, at the rate of two per cent upon so much of said gross income, as defined in sections 138-1-9 and 138-1-11, as exceeds six hundred dollars and consists of or is derived from dividends from corporate stock, interest on money, notes, credits, bonds and other securities, including, in the case of a resident beneficiary of an estate or trust, so much of the net income of such estate or trust as is derived during his taxable year from such dividends and interest and is properly paid or credited or is required to be distributed currently to such beneficiary. Where the net income paid, credited or required to be distributed currently to any such beneficiary shall consist in part of income from such dividends and interest and in part of income from other sources, the proportion of the net income paid, credited or required to be distributed currently to such beneficiary which shall be subject to said surtax, if not readily ascertainable from the books and records of the beneficiary, shall be an amount which bears the same ratio to his said share of the net income so paid, credited or required to be distributed currently, as the portion of the gross income of the estate or trust consisting of such dividends and interest, bears to the total gross income of said estate or trust. Partners, joint venturers and members of a pool, syndicate, or other organization, not subject to tax as a corporation shall include in their individual returns as gross income subject to surtax, their shares of that portion of the net income of the partnership, joint venture,

syndicate, pool or other organization, not subject to tax as a corporation, which constitutes the same proportion of said net income as the amount of gross income of the partnership, joint venture, syndicate, pool, or other organization not subject to tax as a corporation, consisting of such dividends and interest, bears to the total gross income of said partnership, joint venture, syndicate, pool, or other organization not subject to tax as a corporation.

"In the case of a return made for a fractional part of a year, the surtax exemption shall be reduced to an amount which bears the same ratio to six hundred dollars as the number of months in the period for which the return is made bears to twelve months.

"(4) As to taxpayers on the calendar year basis and in lieu of the computation of normal tax in accordance with any other method prescribed herein, such calendar year taxpayers may compute their normal tax in accordance with a table prescribed and promulgated by the director of revenue which shall arrive at the tax payable on the adjusted gross income of less than five thousand dollars of the taxpayer by allowing the standard deduction as provided in section 138-1-13 in lieu of all other deductions."

"138-1-3. Corporations. — (1) Upon corporations, except those corporations described in section 138-1-6, there shall be levied and collected and paid for each taxable year, a tax at the rate provided in subsection (2) of this section upon the net income of every corporation derived from sources within this state. Income from sources within this state includes income from tangible or intangible property located or having a situs in this state and income from any activities carried on in this state, regardless of whether carried on in intrastate, interstate or foreign commerce.

"(2) The rate of tax applied to corporations taxed under subsection (1) of this section shall be five per cent for each taxable year.

"(3) For one taxable year only, that being the calendar year 1953 or a fiscal year beginning during the year 1953, there shall be allowed as a credit against the tax computed in accordance with the rate in subsection (2) of this section, an amount equivalent to twenty per cent of the net tax so computed."

"138-1-6. Taxation of banks.—(1) In lieu of the tax imposed by section 138-1-3 every national banking association located or doing business within the limits of this state, shall pay annually to this state a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, upon the basis of its net income for the next preceding fiscal or calendar year at the rate provided for in subsection (4) of this section. The state of Colorado is hereby adopting the method numbered (4) authorized by the act of March 25, 1926, amending section 5219 of the Revised Statutes of the United States.

"(2) Every bank, industrial bank, Morris plan company, or trust company, finance and loan associations, other than a national association doing business within the limits of this state, shall annually pay to this state for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed in the manner hereinafter provided, upon the basis of its net income for the next preceding fiscal or calendar year at the rate provided for in subsection (4) of this section.

"(3) The tax levied in subsections (1) and (2) of this section shall be in lieu of all property taxes imposed by the state, or any subdivision thereof upon the banks, industrial banks, trust companies, and Morris plan companies therein mentioned or upon the shares of capital stock thereof, except taxes upon their real estate.

"(4) The rate of tax on national banking associations and interstate finance or loan associations and other banks,

industrial banks, trust companies, finance and loan associations, and Morris plan companies mentioned in subsections (1), (2) and (3) of this section shall be six per cent of the amount of the net income as herein provided.

"(5) Net income is defined, for the purpose of this section, to be gross income from all sources as defined in section 138-1-9, less credits and deductions allowed to corporations under section 138-1-12, excepting that income received from government and municipal securities is not allowable as a deduction from gross income.

"(6) If any tax levied by this section is finally adjudged discriminatory against a national banking association, contrary to section 5219, United States Revised Statutes, as amended, or if, for any reason, the tax levied against national banking associations is invalid, the net income of these associations, as defined in subsection (5) of this section, shall be taxed in this state in the manner and to the extent provided in section 138-1-3 relating to private corporations; and state banks and trust companies in this state shall be taxed in a similar manner.

"(7) Every national banking association, state bank, industrial bank, trust company, finance and loan associations, or Morris plan company, subject to taxation under this section shall make its return to the director of revenue at the same time and in the same manner required of other corporations and except as to the manner of computing the net income subject to tax, each shall be subject to all other provisions of this article applicable to such other corporations."

"138-1-39. Periods of limitation—waiver.—

* * *

"(3) No claim for refund or credit shall be allowed unless within four years from the date of the last payment on account of the tax for the year in question a claim has

been filed by the taxpayer; provided that the amount of the refund or credit shall not exceed the portion of the tax and penalties paid during the four years immediately preceding the filing of the claim. Suit for refund may be commenced at any time within two years after the date of mailing of notice of final decision on claim for refund, or at any time after the expiration of six months after the filing of a claim for refund upon which no action has been taken by the director, as the case may be."

* * *

"138-1-40. Refunds.—(1) A revolving fund, designated 'income tax refund,' not to exceed fifty thousand dollars shall be set aside and maintained by the state treasurer from taxes collected under this article, and held by the state treasurer for the prompt payment of all refunds.

"(2) If the director discovers from the examination of a return, or upon claim duly filed by the taxpayer, or upon final judgment of a court, that the tax, penalty or interest paid by any taxpayer has been illegally or erroneously collected or is in excess of the amount legally due, then the director shall issue in favor of the taxpayer his voucher to the state controller, for the refund of such illegally collected tax, penalty or interest, regardless of whether or not such sum was paid under protest, together with interest provided for in subsection (3) of this section. Upon receipt of such voucher, properly executed and endorsed, the state controller shall issue his warrant for the payment to the taxpayer, out of the fund provided in subsection (1) of this section; provided, that the state controller shall keep in his files a duplicate of said voucher and also a statement which shall set forth the reason why such refund shall have been ordered.

"(3) Upon the allowance of a credit or refund of any tax, penalty or interest erroneously, improperly or illegally paid, interest shall be allowed and paid on the amount of

such credit or refund at the rate of one-half of one per cent per month from the date such tax, penalty or interest was paid to the date the order for refund or credit is issued.

"(4) Whenever it is established that any taxpayer has overpaid for any year the tax imposed by this article, and that there is an unpaid balance of tax and interest accrued thereon, according to the records of the director, owing by such taxpayer for any other year, so much of the overpayment of tax plus interest allowable thereon as does not exceed the amount of such unpaid balance, shall be credited thereto and any excess of the overpayment shall be refunded."

"138-1-45. Allocation of collection.—All moneys collected under the provisions of this article shall be deposited daily with the state treasurer, who shall credit such moneys as follows:

"(1) Five per cent of the moneys collected shall be placed in a separate fund designated 'income tax refund fund' as provided in section 138-1-40. Any taxpayer who shall establish a claim that he has paid a greater amount that this article requires shall be reimbursed from such fund, and if such fund be insufficient, then such reimbursement shall be made from current collections under this article without regard to the year or period to which said refund relates, provided the period of limitations shall not be violated. If at the end of any state fiscal year there shall remain in such fund an amount in excess of fifty thousand dollars, then such excess amount shall be transferred to the general fund of the state.

"(2) Five per cent of the moneys collected shall be placed to the credit of the department of revenue administration fund, from which so much thereof as may be necessary shall be annually appropriated by the general assembly to the department of revenue for the administration of this

article. If at the end of any state fiscal year there shall remain in such fund an amount in excess of the apporpriation made by the general assembly, then such excess amount shall be transferred to the general fund of the state.

"(3) Ninety per cent of the moneys collected shall be placed to the credit of the general fund of the state."

FILE COPY

No. 220 Misc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

THE CALIFORNIA COMPANY, a corporation, *Appellant*,

v.

STATE OF COLORADO, ROBERT A. TILLOTALD, As Director of Revenue of the State of Colorado, HOMER F. BEDFORD, As Treasurer of the State of Colorado, *Appellees*.

On Appeal From the Supreme Court of the State of Colorado

MOTION TO DISMISS

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32	6
Welch v. Henry, 305 U.S. 134	10
West Publishing Co. v. McColgan, 328 U.S. 823	13
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Colorado Revised Statutes, 1953, Section 100-6-1, 5	7
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 930

THE CALIFORNIA COMPANY, a corporation, *Appellant*,

v.

STATE OF COLORADO, ROBERT A. THEOBALD, As Director of Revenue of the State of Colorado, HOMER F. BEDFORD, As Treasurer of the State of Colorado, *Appellees*.

On Appeal From the Supreme Court of the State of Colorado

MOTION TO DISMISS

Pursuant to Rule 16, appellees move to dismiss the appeal from the final judgment of the Supreme Court of the State of Colorado, or, in the alternative, to affirm the judgment below, on the ground that the appeal presents no question sufficiently substantial to warrant further argument.

QUESTIONS PRESENTED

1. Whether, either the due process clause or the equal protection clause of the Fourteenth Amendment to the Constitution of the United States prevents the State of Colorado from imposing, at rates graduated in accordance with the entire amount realized from the sale or other disposition of petroleum products, a tax upon the production in the State of Colorado of oil and natural gas?

2. Whether, the imposition of such a tax upon all producers of oil and natural gas is invalid under the commerce clause of the Constitution of the United States, when the tax is imposed upon a producer who produces, processes, and sells the product within the State of Colorado to another person who immediately places the oil in interstate commerce?

STATEMENT

The California Company is a part of the corporate chain of Standard Oil Company of California. (*infra*, p. 4a)[1] It is the largest producer of oil at Rangely and in the entire State of Colorado. (*infra*, p. 1a) In the year 1953, the California Company produced approximately $26,000,000 of taxable petroleum products. (Appellant's Jurisdictional Statement, p. 9) almost all of which was crude oil sold in Colorado to others who ultimately disposed of it in interstate commerce.

The Colorado activities of the California Company are those of a producer only, and the company does not

[1] The findings of fact of the trial court are set forth as Appendix A to this motion to dismiss. References in this statement of facts are, except where otherwise noted, to the findings of fact made by the trial court and to Appendix A.

act as a marketer. (*infra*, p. 4a) It operates wells from which it extracts a mixture of oil and gas. (*infra*, p. 3a) From the well head, the mixture flows by pipe to a "separator", and most of the gas is removed. After the separator processes have been completed, the oil is piped to a "heater-treater", where the remainder of the natural gas is removed from the oil. Following this, the oil is piped to the lease tanks, in which it is temporarily stored and gauged or measured. (*infra*, p. 3a, Deft's Exhibit 14)

Connected to these lease tanks is a pipe line operated and owned by a common carrier, which carries the oil in interstate commerce for the purchasers, Standard Oil of California, Western States Refining Company, and Uinta Oil Refining Company. (*infra*, p. 4a) Until oil passes the outlet valves of California's lease tanks, it remains the property of that company, but at the instant which it leaves the lease tanks, it becomes the property of the buyer under the terms of a contract which provides (*infra*, p. 4a, Pltf's Exhibit 22)

> Crude oil sold under this agreement shall be delivered for Buyer's account to the pipelines connected to Seller's lease and fee storage tanks in the Rangely Field for interstate shipment. Title to crude oil thus delivered shall pass to Buyer when the oil passes the outlet valves of such storage tanks.

There is no market for the natural gas produced by the California Company in the Rangely Field. Consequently, except for a small amount of the natural gas used locally for heating purposes, and a somewhat larger portion used for re-injection, the gas is "flared", or burned in the open air. (*infra*, pp. 5a, 6a). The

record (R.T., p. 551)[2] shows, and the trial court found (*infra*, p. 6a) that this flaring not only results in a complete waste of the gas itself, but, according to the estimate of the company's own expert (R.T., p. 846), because of the loss of pressure, the total oil production of the Rangely Field by the California Company alone will be diminished by five hundred million dollars. The trial court also found that the amount of gas produced and flared increases progressively as the oil production increases. (*infra*, p. 7a, Deft's Exhibits 18 and 19) On the other hand, the trial court found that there is a direct relationship between gross production of oil from an established field and net profit. (*infra*, 7a, R.T., pp. 817, 818, 820, 821)

In 1953, the Colorado Legislature imposed a tax upon that portion of the gross income of every person derived from the production or extraction of crude oil or natural gas. The term "gross income" was defined as the entire amount realized from the sale or other disposition of all crude oil and natural gas produced or extracted during any taxable year from petroleum deposits located within Colorado. The tax rate is graduated, beginning at a rate of two percent on amounts less than $25,000, and increasing to a rate of five percent on amounts in excess of $300,000. The payment of certain ad valorem taxes is allowed as a direct credit against the tax imposed by this statute. Chapter 131, Colorado Session Laws, 1953; Colorado Revised Statutes, 1953 Section 138-1-7.

The California Company paid the tax imposed upon it by the statute under protest, and subsequently filed

[2] Citations to Reporter's Transcript are indicated by the initials R.T.

a claim for the refund of the tax. Its protest and claim for refund asserted that the statute is arbitrary and unreasonable in establishing an unreasonable classification and thus repugnant to the due process and equal protection clauses of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and further, that the tax constitutes an unreasonable burden upon interstate commerce in violation of the interstate commerce provisions of Section 8, Article I, of the Constitution of the United States. (Appellant's Jurisdictional Statement, p. 9).

These objections to the validity of the tax were rejected by the State Department of Revenue, the trial court, and by the Supreme Court of Colorado. The appellant continues to assert them as the basis of its appeal to this Court.

REASONS FOR DISMISSING THE APPEAL

The appeal in this case should be dismissed, or in the alternative, the judgment of the Supreme Court of Colorado should be affirmed, because in the light of the decisions of this Court, the grounds advanced by the appellant for asserting that the statute is invalid are insubstantial.

I. THE CLASSIFICATION UPON WHICH THE PETROLEUM TAX ACT IS BASED IS A REASONABLE ONE, AND IS THEREFORE VALID

Appellant's first challenge to the tax is the assertion that the statute denies it the equal protection of the law. Appellant, however, makes no real effort to demonstrate that the statute is arbitrary or oppressive. On the contrary, the company contents itself with the

assertion that any graduated gross income tax is, in itself, an arbitrary discrimination.[3]

This assertion raises no substantial question. The fact that one taxpayer is treated differently from another, standing alone falls far short of establishing the arbitrary discrimination forbidden by the Fourteenth Amendment. The governing principle was stated by this Court in *Ohio Oil Company* v. *Conway*, 281 U.S. 146, 159:

> The States, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the Fourteenth Amendment, but that Amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation. The State may tax real and personal property in a different manner. It may grant exemp-

[3] In making this broad assertion, appellant relies exclusively upon the supposed authority of *Stewart Dry Goods Co.* v. *Lewis*, 294 U.S. 550, and *Valentine* v. *Great Atlantic & Pacific Tea Co.*, 299 U.S. 32, a decision which rested entirely upon the authority of the *Stewart* case. The *Stewart* case invalidated a graduated sales tax, because the Court felt that the result of such a tax, under the circumstances shown, was arbitrary. The tax was imposed upon all retailers, and took no account of the fact that margins of profit vary widely in the various retail enterprises. As an example of the arbitrary effect of the tax, the Court pointed to the fact that one of the challengers of the tax suffered a net loss, although its gross sales were more than eleven million dollars in one year. But there is nothing in the *Stewart* decision which supports the appellant's view that the fact that the tax is graduated, and that fact alone, invalidates a tax based upon a reasonable classification in which the volume of business is one of the factors reasonably distinguishing one class of taxpayers from another class. The Colorado tax is, as we demonstrate, based on a rational classification which fully justifies the graduation of the tax rates.

> tions. The State is not limited to ad valorem taxation. It may impose different specific taxes upon different trades and professions and may vary the rates of excise upon various products. In levying such taxes, the State is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use, or value.

The tax which the appellant challenges in this case is a valid exercise of this power to make distinctions between classes of taxpayers. It rests upon two rational foundations derived from the expressed policy of Colorado.

The first, and perhaps the most important, basis of the classification represented by the graduation of the rates upon the extraction of petroleum products is the established and legislatively declared policy of Colorado to prevent the waste of oil and gas.[4] The amount of oil produced has a definite relationship to the waste of gas and the diminution of the ultimate recovery from the field. "It is true, no doubt, that where size is not an index to an admitted evil, the law cannot dis-

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[4] Colorado Revised Statutes, 1953, 100-6-1; 5: "Section 1. The waste of oil and gas or either of them in the State of Colorado as in this Act defined is hereby prohibited.

* * * * * * * * * * *

"Section 5. The term 'waste' as applied to gas shall include the escape, blowing, or releasing, directly or indirectly, into the open air of gas from wells productive of gas only, or gas in an excessive or unreasonable amount from wells producing oil or both oil and gas; and the production of gas in quantities or in such manner as will unreasonably reduce reservoir pressure or unreasonably diminish the quantity of oil or gas that might ultimately be produced; excepting that gas that is reasonably necessary in the drilling, completing, testing, and in furnishing power for the production of wells."

criminate between the great and small. But in this case size is an index." *Engel* v. *O'Malley*, 219 U.S. 128, 138. Increasing production in the Rangely Field has led inevitably to such a waste of natural gas as the legislature attempted to prevent. In this case, the trial court found (*infra*, p. 6a)

> The gas has the necessary physical characteristics to permit its application to economic use, but a pipeline has never been built, and without a pipeline there is no available market for gas and it has no present economic value. Therefore, it is wasted by flaring.
>
> During 1953, hundreds of billions of cubic feet of this gas were flared and wasted by the California Company as a quick and easy way to dispose of the gas, and as a way to permit the company to produce and sell its oil.
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> * * * * * * *
>
> Additionally, more rapid production of the oil results in progressively higher waste of gas. To illustrate, with small production, approximately 500 cu. ft. of gas is produced with each barrel of oil taken from the ground; but, with increased production (production which was reached by the California Company at Rangely in 1953) approximately 2,000 cu. ft. of gas is produced with each barrel of oil. Thus, since almost all of the gas is wasted, the increased production results in progressively increased economic waste.

That the State of Colorado may, agreeably with the provisions of the Constitution of the United States, prevent such waste of a valuable natural resource is not open to doubt. *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 233, 234. It is equally indisputable that taxation may be made the implement

of the exercise of the state's police power. *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, 426.

A second rational basis for the graduation of the tax is the greater ability of the larger producers to pay the tax. The trial court found from the evidence (*infra*, p. 7a)

> At the same time, because of the peculiar nature of the petroleum industry, an increased rate of production typically results in an increased rate of net profit. In this connection, income derived from proven oil reserves, readily served by pipeline, is economically more akin to dividends received from stock or to interest received from bonds than it is to income derived from the unusual highly competitive retail business. Once a field is proven and transportation facilities are available, the nature of the business is such that the more oil which is produced and sold (limited, of course, by good production practices), the higher the rate of immediate net profit. The company's own expert admitted that this is typically true of the industry; and, certainly, the California Company made neither a contention nor a showing that it operated at a loss in Colorado during 1953, or, for that matter, during any other year.

Graduated rates of tax justified by a greater ability to pay are imposed by the Federal government and by the over-whelming majority of the states. It is much too late a day in constitutional history seriously to contend that a tax structure founded upon increasing rates of profit is an arbitrary classification.[5] In a

[5] The failure of the California Company to observe that the rationale of the *Stewart* decision is found in the fact that the taxpayer there demonstrated the lack of relationship between increasing volume of sales and net earnings. This undoubtedly explains appellant's complete and unfounded reliance on *Stewart*

variety of situations, this Court has approved graduation of tax rates based upon increasing values, and consequent greater ability to pay. In *Great Atlantic & Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, a progressively increasing tax rate upon store units under a common ownership was held valid because the Court found basis for it in the more favorable buying power, and consequent earnings of multiple stores. In *Ohio Oil Co.* v. *Conway*, 281 U.S. 146, the increasing value of petroleum of different grades was held to supply a rational foundation for graduated rates of tax based upon a gravity scale. In *Pacific American Fisheries* v. *Territory of Alaska*, 269 U.S. 269, the fact that a small pack may mean a loss and a larger one a profit was found to be an intelligible ground of policy justifying tax rates graduated in relation to the number of cases of salmon packed. In *Welch* v. *Henry*, 305 U.S. 134, graduated rates of tax imposed upon income from dividends were sustained.

These examples are sufficient to indicate that the graduation of tax rates does not deny equal protection if it rests upon intelligible bases of public policy. As we have demonstrated, the graduated rates imposed by the Colorado petroleum extraction tax have an intelligible and justifiable basis either in the public policy to discourage waste of a valuable natural resources or in the demonstrated correlation between greater profits and increasing production. The appellant's argument

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Dry Goods Co. v. *Lewis*, 294 U.S. 550. In contrast, the present case is one in which the appellant failed to make any such showing. On the other hand, the State proved that there is a correlation between increasing production and greater net earnings. It follows that, as applied here, the *Stewart* case does not support the argument made by the appellant that ability to pay is not a proper basis of classification.

that the tax is arbitrary merely because the rates are graduated raises no substantial question which would justify this Court in interfering with the taxation and fiscal policies adopted by the Colorado legislature.

II. THE TAX UPON THE EXTRACTION OF PETROLEUM PRODUCTS DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

A. The Tax Is Imposed Upon a Purely Intrastate Activity Occurring in the State of Colorado, an Activity Which Is Not Interstate Commerce

The tax which the appellant challenges is undeniably placed upon an activity which begins and ends in Colorado. The California Company produces oil in Colorado from lands in Colorado; processes the oil in Colorado; stores and measures the oil in Colorado; and sells it in Colorado. That such activities are exclusively intrastate is not arguable. Appellant asserts[6] that the fact that its sales are made to persons who immediately place the oil in interstate commerce deprives Colorado of jurisdiction to tax the producing activities.

[6] Appellant relies primarily on *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, and *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157, for support of its assertion that its activities constitute interstate commerce. Neither of these cases is relevant to the issue of the jurisdiction of Colorado to levy the tax. The *Phillips* case involved the duty of the Federal Power Commission to regulate the price paid by interstate pipelines for natural gas ultimately sold to consumers in other states. *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, *supra*, involved a situation precisely the reverse of the situation created by the Colorado tax. In *Michigan-Wisconsin*, the tax was laid upon the purchaser, who was forbidden to pass it on to the producer. The tax was held invalid because it was not imposed until the product had entered interstate commerce. By contrast, the Colorado tax is imposed on the extraction of the oil, and before the sale by which the oil enters the flow of interstate commerce.

This Court has rejected an equivalent assertion too many times for appellant's proposition seriously to be argued now. See, *e.g.*, *Oliver Mining Co.* v. *Lord*, 262 U.S. 173, 178; *Hope Natural Gas Co.* v. *Hall*, 274 U.S. 284, 288; *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 235; Cf, *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165, 182. In *Oliver Mining Co.* v. *Lord*, *supra*, the Court, in flatly rejecting the argument advanced hereby appellant, said (262 U.S. at pp. 178, 179)

> . . . Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation. . . . Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce.
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> * * * * * * *
>
> The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. . . .

B. The Colorado Petroleum Extraction Tax Does Not Constitute a Substantial Burden Upon Interstate Commerce

Since the tax is imposed exclusively upon local activity within the State of Colorado, there is no arguable basis for asserting that it is a burden on interstate commerce. But even if the activity were wholly interstate commerce, Colorado could impose the tax, provided it required no more than that the California Company pay its fair share of the tax burden. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 461, 462.

If the California Company means to assert that there is here lacking a sufficient local activity to forge a minimum connection (Cf, *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 344, 345) to satisfy jurisdictional requirements for the imposition of the tax, its argument strains credulity. The Colorado tax is laid upon income producing activities all of which occur within the States. The extraction, gathering, measuring, and sale of the petroleum—if not in fact all of appellant's income producing activities—constitute a far larger proportion of income production than the maintenance of a sales office used only as a clearing house for orders (*Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 460) or the use of borrowed space for the storage of books (*West Publishing Co.* v. *McColgan*, 328 U.S. 823).

Can it be seriously argued that the Colorado tax is discriminatory or an unreasonable burden on interstate commerce? It does not, and does not purport to, exact a single penny's worth of tax for the privilege of engaging in interstate commerce within the State. It taxes the extraction of oil without regard to the sale of the product in interstate or intrastate commerce. In no way does it attempt to impede or suppress those selling in interstate commerce. Cf, *Nippert* v. *City of Richmond*, 327 U.S. 416. No local producer or seller or buyer receives any advantage over the California Company.

Any assertion that this tax is a discriminatory burden upon interstate commerce is simply not supported by the facts, and does not raise any substantial question.

CONCLUSION

As we have demonstrated, the tax challenged by the California Company rests upon rational considerations of policy which sustain any classification resulting from the graduation of the tax rates. The tax is imposed only upon activities undeniably local in nature. The appeal which here challenges the tax raises no substantial question, and should be dismissed.

Respectfully submitted,

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June 7, 1960

APPENDIX

APPENDIX A

Findings of Fact by the Trial Court

(Introductory matters and conclusions of law are omitted.)

Upon these issues framed by the pleadings, several days' testimony was taken to establish the facts considered pertinent and material by the parties. There were some conflicts in the testimony, but, having observed the witnesses on the stand, the Court finds the following facts:

Colorado has not been blessed with numerous large oil fields, and the largest known field in this state is Rangely Field. The California Company is both the largest producer of oil at Rangely and the largest producer in the entire state. In addition to its production at Rangely, it has other Colorado production at the Wilson Creek and the Black Hollow Fields, but Rangely represents the greatest proportion of its activity and production. That being true, although the production and marketing procedures differ in unimportant detail at Rangely, Wilson Creek and Black Hollow, most of the testimony concerned Rangely, and the detail of the procedure at Rangely is set forth in this opinion. In all fields in Colorado in which the company has production it operates under conventional oil and gas leases. In some instances, private individuals are the lessors, and in others the leases have been granted by the United States, and it is the existence of these latter leases which has given rise to the contention of the company that the tax is unlawful as (in the language of the plaintiff's brief) "a tax upon property of the United States and an unlawful burden upon an instrumentality of the United States."

As a preface to a discussion of the constitutional arguments of the parties and to a consideration of some of the authorities cited in the briefs, it is appropriate to mention the geographic location of the fields. Rangely is located in the extreme western part of the state. It is

separated from the population and industrial centers of Colorado by the Continental Divide, and the nature of the terrain is such that the normal market for the oil produced from the field is across the Colorado-Utah line into Salt Lake City, rather than across the mountains into Denver. Wilson Creek is also located to the west of the Divide, and the natural market for its production is by pipeline into Wyoming where the Colorado oil mingles with Wyoming oil in the interstate pipelines serving the Wyoming fields. Black Hollow is east of the divide, and some of its oil is marketed intrastate while some is marketed interstate. Geographic features are such that it is almost inevitable that Rangely and Wilson Creek oil be transported across state lines for refining and for ultimate consumption and use. There appears to be no present probability that an intrastate pipeline will be built to refine either Rangely or Wilson Creek oil in the State of Colorado. The California Company urges that this is of importance, because one of its contentions is that "the oil is in interstate commerce from the time it leaves the bottom of the hole until it reaches the refinery at the end of the interstate pipeline."

Some oil which is produced in Colorado flows into Wyoming where it mingles with oil produced in Wyoming in its journey to refinery and to ultimate consumer. The Colorado oil is in free and open competition with Wyoming oil, and there was no showing that the tax in question hampers or in any way impedes the sale of Colorado oil. Wyoming has no "severance tax" or other special tax on the production of oil, and, if it be determined that the oil produced by the California Company is in interstate commerce when owned by that corporation, there is no evidence in the record showing that the tax constitutes an unreasonable burden on commerce as a factual matter. Accordingly, the Court specifically finds that the quantum of the tax represents only a fair share of the cost of state government, and that the tax does not interfere in any way with the sale of oil in interstate commerce, and that it

does not constitute an unreasonable burden on that commerce.

Returning, now, to a consideration of the history and production methods used at Rangely Field, it appears that the field was discovered and proven more than 10 years before its true development. Substantial production from the field did not commence until after the gasoline shortage resulting from World War II; and the development of the field has taken place for the most part since that time. During the long period of dormancy of the area, the California Company was the principal lessee, and it has been a moving factor in the development of the area into a major oil field.

The production and marketing procedure is substantially as follows:

Oil and gas reach the surface (referred to in the testimony as the "well head") as a homogeneous mass; and, of physical necessity, if oil is brought to the surface, gas is mixed with it. (However, as will be mentioned in more detail later herein, as the rate of production of oil increases, the rate of production of gas increases in more rapid progression.)

After the admixed oil and gas reach the well head, the mixture flows by pipe (owned by the California Company) to a "separator." The separator processes the mixture to remove most of the gas from the oil. The oil then flows by pipe (owned by the California Company) to a "heater-treater" where the remainder of the gas is removed from the oil. From the heater-treater, the oil is transported by pipe (owned by the California Company) to "lease tanks" (owned by the California Company) in which the oil is temporarily stored and is gauged or measured. To this point, the oil has not left the lease site or its immediate vicinity, and it is the sole property of the producer—the California Company.

The lease tanks are connected to an interstate pipeline operated as a common carrier, and, at the instant the oil leaves the lease tanks, it starts its journey in interstate commerce. The California Company does not own and it has no interest in the interstate pipeline. To the contrary, that pipeline is owned and operated by a separate corporation.

The California Company retains title to and retains all of the increments of ownership of the oil up to the point in the production process that the oil leaves the lease tanks, but, by contract, title and all increments of ownership pass to a purchaser at the instant the oil leaves the lease tanks and enters the interstate pipeline. The California Company itself sends no oil owned by it through the pipeline. Instead, all of the oil it produces in the State of Colorado is sold to other corporations—that is, to Standard Oil Company of California, Western States Refining Company and Uinta Oil Refining Company, all of which are corporations entirely separate and distinct from plaintiff and entirely separate and distinct from the pipeline company—and these sales are fully consummated when the oil leaves the lease tanks. At that instant, the purchaser's firm obligation to pay for the oil comes into being, and all risk of loss is on the purchaser.

The evidence shows that although the California Company is part of the corporate chain of Standard Oil Company of California, the California Company is a separate corporation; and, at least as to all oil it produces in Colorado, the company acts only as a producer and not as a marketing company. The total interest of the California Company in all oil it produces in Colorado ceases, after the oil has been produced and twice processed by the company, but long before the oil leaves the State of Colorado.

The gas produced by the California Company in Colorado never enters an interstate pipeline, and, by stipulation of the parties, it was agreed in the course of the trial that

there is no contention made that, as applied to gas, the statute in question imposes an unconstitutional burden on interstate commerce. Nevertheless, in connection with other issues involved in the case, and in connection with the consideration of some of the recent decisions of appellate courts, it is necessary that the disposition made of the gas be traced.

The gas resulting from the oil processing at both the separator and the heater-treater flows by pipe into the Rangely Gasoline Plant. This plant is owned by some, but not all, of the lessees at Rangely Field, and the California Company has been designated as its "operator" by contract among the several plant owners. The function of this plant is to extract or manufacture from the gas the finished products of butane, propane and natural gasoline, all of which are marketed without transportation in interstate pipeline.

The gas entering the plant from the separator and the heater-treater is commonly called "wet gas", and, after the finished products of butane, propane and natural gasoline are extracted or manufactured in the plant, the residue gas which results is commonly called "dry gas". The finished products are then sold, with the gasoline plant acting as sales agent for all owner-lessees and non-owner-lessees, and the sales price is distributed among owner-lessees and non-owner-lessees in accordance with contract formula. Except for a small amount of the dry gas sold in and about the Town of Rangely, the proceeds received from the sale of the finished products represent the entire cash income received by anyone for the gas.

After the wet gas has entered the plant, and after the finished products have been extracted from it, the dry gas is returned to the leases from which it was produced. There, a small amount of it is used for fuel and heating purposes on the lease sites; but the overwhelming percentage of it is "flared." Flaring consists simply of burn-

ing the gas to get rid of it, and it is done because there is no pipeline for gas leading from the field to a population center which could consume and make economic use of it. The gas has the necessary physical characteristics to permit its application to economic use, but a pipeline has never been built, and without a pipeline there is no available market for the gas and it has no present economic value. Therefore, it is wasted by flaring.

During 1953, hundreds of billions of cubic feet of this gas were flared and wasted by the California Company as a quick and easy way to dispose of the gas, and as a way to permit the company to produce and sell its oil. Some of this gas could have been reinjected into the structure; and, according to the opinion of the California Company experts, reinjection would save some of the gas and would increase the life and the total production to be expected from the field. In fairness to the California Company, it now is and at all times has been a vigorous advocate for a conservation program which would require the reinjection of some of the gas. However, other interests in the field opposed reinjection, and the Colorado Oil and Gas Commission was unable to demand reinjection over the opposition of other lessees. Since it is not feasible for one lessee to reinject his or its gas into the structure if other lessees refuse to follow suit, the California Company was unable to carry out a satisfactory conservation and reinjection program during 1953.

However, even if gas were reinjected into the structure to the maximum amount urged by the California Company, many, many billions of cubic feet of gas would be flared and wasted by the California Company annually at Rangely Field. Thus, reinjection would reduce, but it would not eliminate the great economic waste resulting from flaring. The only way that this waste can be eliminated is to permit the oil to remain in the ground until there is an available pipeline from Rangely to some area which has a need for the gas.

Additionally, more rapid production of the oil results in progressively higher waste of the gas. To illustrate, with small production approximately 500 cu. ft. of gas is produced with each barrel of oil taken from the ground; but, with increased production (production which was reached by the California Company at Rangely in 1953) approximately 2,000 cu. ft. of gas is produced with each barrel of oil. Thus, since almost all of the gas is wasted, the increased production results in progressively increased economic waste.

At the same time, because of the peculiar nature of the petroleum industry, an increased rate of oil production typically results in an increased rate of net profit. In this connection, income derived from proven oil reserves, readily served by pipeline, is economically more akin to dividends received from stock or to interest received from bonds that it is to income derived from the usual highly competitive retail business. Once a field is proven and transportation facilities are available, the nature of the business is such that the more oil which is produced and sold (limited, of course, by good production practices), the higher the rate of immediate net profit. The company's own expert admitted that this is typically true of the industry; and, certainly, the California Company made neither a contention nor a showing that it operated at a loss in Colorado during 1953, or, for that matter, during any other year. In fact, the evidence showed that in both 1953 and 1954 (the only two years as to which evidence was offered as to company profits) the company made more than $1 million in net profit from its Colorado operations, after taking full allowance for the 27½% depletion which is allowed.

Any consideration of the multiple problems presented in this case must be grounded upon the recognition of the fundamental proposition that oil and gas constitute two of the great and critical natural resources of the nation.

The people of this state have since the inception of our government expressed the desire that the state exercise reasonable supervisory control over the state's resources; in fact, Article XVI of the Constitution of Colorado is devoted in its entirety to provisions concerning mining and water. Surely, then, as a factual matter, it is difficult to see how it can be contended that the imposition of a tax on the income derived from the production of oil in this state represents an unreasonable classification by the legislature. The facts conclusively show, and the Court finds as a fact that the classification is reasonable.

Before discussing the constitutional questions urged, brief mention must be made of some of the accounting and business procedures adopted by the California Company in preparing its income tax return. It will be recalled that in defining the phrase "gross income derived from the production or extraction of crude oil, natural gas, or both crude oil and natural gas from petroleum deposits located within this state," the legislature said that the phrase means:

> "the entire amount realized from the sale or other disposition of all crude oil and natural gas produced or extracted *during any taxable year* from petroleum deposits located within this state."

In preparing its return, the company made customary inventory adjustments, but, at time of trial, in some of the exhibits introduced by the company, and in the testimony of one of its principal accountancy witnesses, the company took the position that the production and sale both had to occur during a single tax year before any tax was due. It said at time of trial that if production was in one year and if sale was in the following year, the company would not owe any tax in either year. The accountant witness testified (Reporter's transcript, p. 233):

"Q. So that the net result of this report is that you show on Exhibit DD the proceeds received only from oil produced and disposed of during the period?

"A. That is correct, sir.

"Q. You exclude from this report the proceeds received from oil in inventory at the beginning of the period?

"A. That is correct, sir.

"Q. And you exclude from this report oil on hand at the end of the period?

"A. That is correct, sir."

Thus, it is the company's position that oil in inventory at year end is not taxable in either year, and, carried to its logical absurdity, that position would require the conclusion that if an entire year's production were stored, and if none of the oil produced from a given lease were sold until after the start of the next tax year, no tax would ever be due under the statute. Yet, at the same time that the company is pulling out of its sales the oil on hand at the beginning of a tax year, and at the same time it is not taking into account the oil on hand at the end of a tax year, it is vehemently arguing that the oil is in a continuous flow of interstate commerce from the time it "leaves the bottom of the hole." In the company's eyes, the oil is moving in commerce when its movement serves the company's desires, but it is stalled in inventory when the inactivity helps the then argument of the plaintiff.

Another unusual accounting procedure was shown during the course of the trial. In keeping its books and in preparing its tax returns, the company "assigned" a value to the dry gas used for heat and fuel. The monetary amount of this assigned value was $122,798.36 for the year 1953—the amount allowed as a refund by the Director of Revenue on the California Company's claim that this was gas used on the premises. No one paid anyone $122,798.36 or any other amount for this gas. The basis for assigning this

value was not clearly explained in the testimony, except that there was evidence that it was fixed by "the marketing department"; and, apparently, the value per thousand cubic feet of gas was arrived at by assigning to this gas for which there was no market the same price paid for gas in a Texas field where there was a pipeline and market for gas. The dollar value assigned to the gas at Rangely could not be correlated with the price paid for the trivial amount of gas sold in and about the Town of Rangely, although that gas was actually the only gas for which a cash consideration was paid by anyone.

The value thus assigned to the dry gas used for heat and fuel at Rangely was then included in gross income on the company's books and on its tax returns. Then, the company took advantage of its 27½% depletion allowance on its actual gross sales increased by the theoretical sale to itself at its self-assigned value for this dry gas. Thereafter, the company claimed this same self-assigned value as an operating expense (after depletion) and it filed its claim for refund with the Director of Revenue, claiming credit for this self-assigned dollar amount on its gross income tax return.

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No. 926 86

October Term 1959

IN THE

Supreme Court of the United States

THE CALIFORNIA COMPANY, a corporation,

Appellant,

v.

STATE OF COLORADO; ROBERT A. THEOBALD, as Director of Revenue of the State of Colorado; HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

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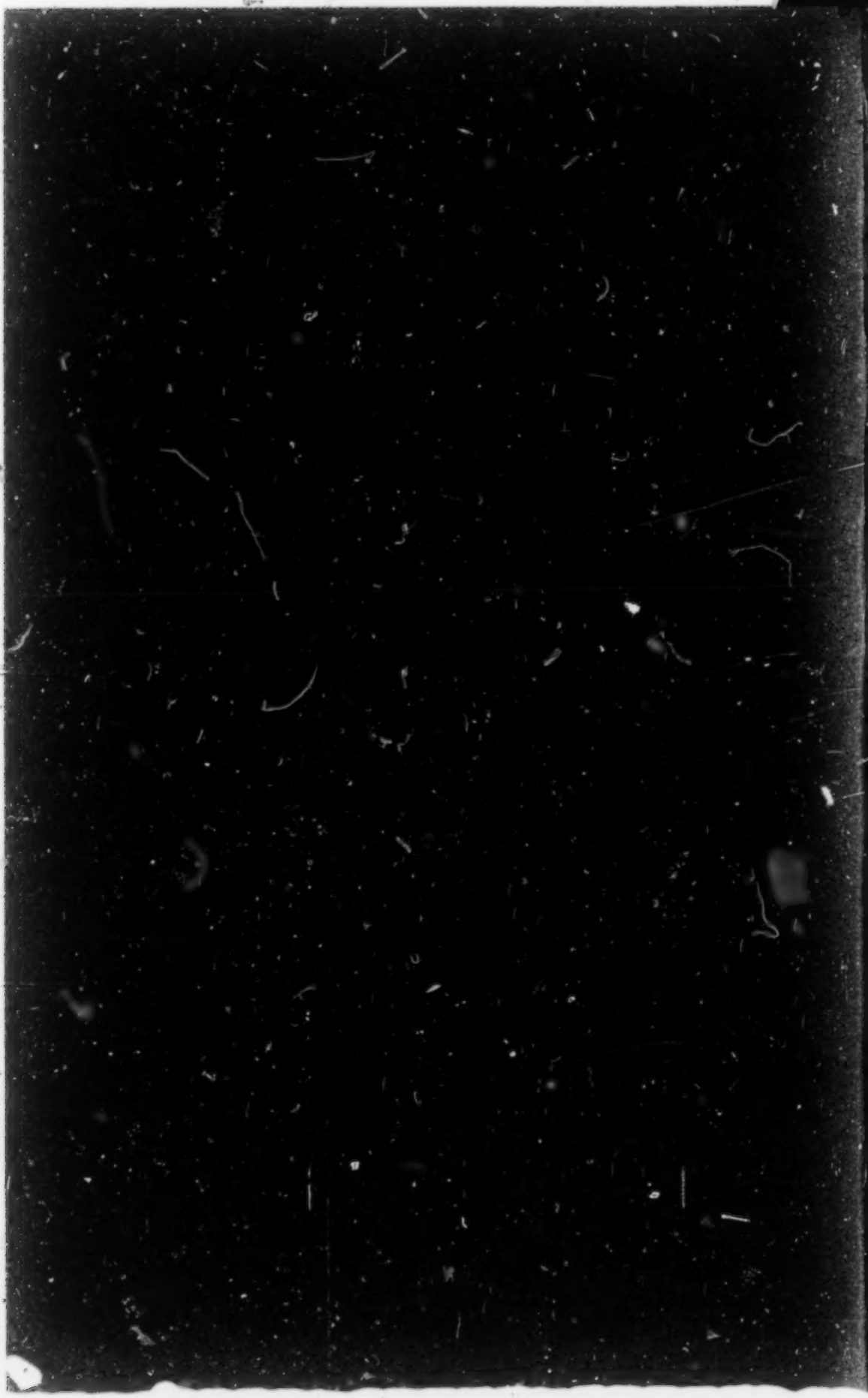
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No. 930

October Term 1959

IN THE

Supreme Court of the United States

THE CALIFORNIA COMPANY, a corporation,

Appellant,

v.

STATE OF COLORADO; ROBERT A. THEOBALD, as Director of Revenue of the State of Colorado; HOMER F. BEDFORD, as Treasurer of the State of Colorado,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF IN OPPOSITION TO MOTION TO DISMISS

Appellees move to dismiss the appeal, or to affirm the judgment below, on the ground that the questions presented are insubstantial.

Appellees' arguments are without merit.

I

THE DECISION OF THE SUPREME COURT OF COLORADO THAT THE GROSS INCOME TAX ACT IS NOT REPUGNANT TO THE FEDERAL EQUAL PROTECTION AND DUE PROCESS CLAUSES IS DIRECTLY CONTRARY TO CONTROLLING DECISIONS OF THIS COURT

The tax here in question is a graduated tax on "the entire amount realized from the sale or other disposition" of Colorado oil and gas (Jurisdictional Statement, pp. 59-60). The decision of the Supreme Court of Colorado sustaining this tax is without precedent.* Beyond this, its

*As we pointed out in the Jurisdictional Statement (p. 13), neither party to this action has discovered any case, federal or state, upholding the validity of a graduated tax on gross income or receipts.

ruling is directly contrary to the decisions of this court in *Stewart Dry Goods Co. v. Lewis*, (1935) 294 U. S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and *Valentine v. Great Atlantic and Pacific Tea Co.*, (1936) 299 U. S. 32, 57 S. Ct. 56, 81 L. Ed. 22. Appellees attempt to dispose of these controlling decisions, both holding invalid graduated taxes on gross sales or receipts, in two footnotes. As to *Stewart*, Appellees say (Motion to Dismiss, p. 6), "The tax was imposed upon all retailers, and took no account of the fact that margins of profit vary widely in the various retail enterprises"; and again (Motion to Dismiss, p. 9) "The * * * rationale of the *Stewart* decision is found in the fact that the taxpayer there demonstrated the lack of relationship between increasing volume of sales and net earnings". As to *Valentine*, Appellees say (Motion to Dismiss, p. 6) simply that it "rested entirely upon the authority of the *Stewart* case".

In its opinion in the *Stewart* case, however, the Court makes clear that a graduated tax on gross sales is "unjustifiably unequal, whimsical and arbitrary" in its operation on those engaged in the same business as well as in its operation on those in different businesses, and this despite a finding of fact by the trial court that as a general proposition increased volume of sales results in increased profits and increased ability to pay the tax. The Court said (294 U. S. 558-559):

> "The district court found that 'generally speaking' he who sells more is in receipt of a greater profit and hence has larger ability to pay, and upon this basis justified the classification. But it is to be remembered that the act in question taxes gross sales and not net income. * * *
>
> * * * * *
>
> "Argument is not needed, and indeed practical admission was made at the bar, that the gross sales of a merchant do not bear a constant relation to his net profits; that net profits vary from year to year in

the same enterprise; that diverse kinds of merchandise yield different ratios of profit; and that gross and net profits vary with the character of the business as well as its volume. The trial court made no finding that the relation between gross sales and net profits, or increase of net worth, was constant, or even that there was a rough uniformity of progression within wide limits of tolerance. Expert witnesses, using data assembled from various reporting agencies, endeavored to establish that net profits or net worth grow with increased sales. But their testimony not only indicated great variations within each class selected for comparison, but also showed that in some of the classes representing the greater amount of sales the net profit or addition to net worth is smaller than in a class having less aggregate sales. The best that can be said for this evidence is that averaging the results of the concerns making the reports it is true 'generally speaking,' as the court below put it, that profits increase with sales. The ratio of increase, however, differs in different lines of activity and even as between concerns carrying on the same business, and so many exceptions and reservations must be made that averages are misleading. The proofs submitted are insufficient to support the appellees' contention that the graduation of the tax was adjusted with reasonable approximation to the net earnings of the taxpayers, and that such minor and incidental inequalities as may be found are those always incident in the application of any valid general rule of classification. * * *"

Further, Appellees, while attempting to distinguish *Stewart* as a case involving a tax which "took no account of the fact that margins of profit vary widely in the various retail enterprises" (Motion to Dismiss, p. 6), fail to mention that in *Valentine* the graduated tax involved was measured by the gross receipts of those engaged in a single variety of retail enterprise, i.e., chain stores. In its opinion

holding the tax invalid, the district court said ((1935) 12 Fed. Supp. 760 at 765):

> "* * *. The limitation in the classification to the taxation of chain stores only could not change the nature of the tax, and this would be true, giving consideration to the distinctive business species of the chain stores and all economic and welfare questions which are brought about by their advantages in making sales. Such questions might well bear on the propriety of the classification, but not on what constitutes the form or nature of a tax."

This Court affirmed per curiam solely upon the authority of *Stewart*.

Appellees also seek to avoid the authority of *Stewart* and *Valentine* by contending that the gross income tax here in question can be sustained as an exercise of state police power directed toward the conservation of oil and gas. The Supreme Court of Colorado did not rely upon or even mention this contention (although it is mentioned by the Trial Court) and nothing in the opinion of the Supreme Court of Colorado suggests that that Court considered this taxing act to be in any way related to conservation. Manifestly the contention is without merit. The State of Colorado has enacted a statute dealing specifically and comprehensively with the conservation of oil and gas (Colorado Revised Statutes 1953, § 100-6-1, et seq.). The Colorado statute expressly defines and prohibits the waste of gas* and, after creating the Colorado Oil and Gas Conservation Commission, expressly gives that body exclusive authority in the following terms:

> "* * *. Any delegation of authority to any other state officer, board or commission to administer any and all other laws of this state relating to the conservation of oil or gas, or either of them, is hereby re-

*See page 7 of the Motion to Dismiss, where the relevant Section of the Colorado statute is quoted in part.

scinded and withdrawn and such authority is hereby unqualifiedly conferred upon the commission, as herein provided. * * *"

(Colorado Revised Statutes 1953, § 100-6-5)

Further, admitting (for the purposes of argument) that the greater the rate of production from a given oil and gas well, the greater the gas/oil ratio, under the Colorado tax act here in question a producer who flares gas would pay no tax thereon, since the tax is levied only on the "amount realized from the sale or other disposition" of oil and gas, whereas a producer who sells his gas would have to pay a graduated tax on the gross receipts therefrom. Clearly, therefore, this taxing statute does not discourage the flaring of gas and manifestly was not and is not intended to have any relation to the conservation of oil and gas.

In their attempt to distinguish *Stewart* and *Valentine*, Appellees aiso rely upon a finding of the Trial Court that "an increased rate of production *typically* results in an increased rate of net profit".* But this finding is no different, or more significant, than the finding in *Stewart* that "generally speaking" one who sells more is in receipt of a greater profit, a finding which this Court in that case held insufficient to sustain the statute. In the words of the Court in *Stewart*, "argument is not needed" that an increased rate of production of oil and gas does not always result in an increased rate of net profit.

There are four other substantial questions as to the reasonableness and validity of the Colorado tax. Appellant sets them forth on pages 3 and 4 of the Jurisdictional Statement. Appellees do not attempt to answer any of these questions.

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*Quoted at page 9 of the Motion to Dismiss. Emphasis ours.

II.

THE DECISION OF THE SUPREME COURT OF COLORADO THAT THE TAXING ACT IS NOT REPUGNANT TO THE FEDERAL COMMERCE CLAUSE IS DIRECTLY CONTRARY TO CONTROLLING DECISIONS OF THIS COURT

As pointed out in our Jurisdictional Statement (pp. 16-19), the decision of the Supreme Court of Colorado sustaining the Colorado gross income tax and holding that it is not repugnant to the federal commerce clause is directly contrary to the decisions of this Court, particularly *J. D. Adams Mfg. Co. v Storen*, (1938) 304 U. S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, *Freeman v. Hewit*, (1946) 329 U. S. 249, 67 S. Ct. 274, 91 L. Ed. 265, and *Mich.-Wis. Pipe Line Co. v. Calvert*, (1954) 347 U. S. 157, 74 S. Ct. 396, 98 L. Ed. 583. Appellees seek to distinguish these cases by arguing that the tax is imposed on purely intrastate activities, and not interstate commerce.

Appellees assert (Motion to Dismiss, p. 11) that "the Colorado tax is imposed on the extraction of the oil, and before the sale by which the oil enters the flow of interstate commerce". In so doing they simply ignore the fact that the tax, being levied on "the entire amount realized from the sale or other disposition" of Colorado oil and gas, is not imposed on oil and gas extracted in Colorado and used as fuel in producing operations, but is imposed only on the gross income from oil and gas so extracted *and sold* (Jurisdictional Statement, pp. 7, 8, 18), which shows conclusively that the tax is not imposed on the extraction of the oil, but on its sale.

This fact alone distinguishes *Oliver Mining Co. v. Lord* (1923) 262 U.S. 172, 43 S. Ct. 526, 67 L. Ed. 929 and the other cases cited by Appellees with it (Motion to Dismiss, p. 12).

Appellees argue that the sales of oil taxed, being made in Colorado, are "exclusively intrastate," dismissing *Phillips Petroleum Co. v. Wisconsin* (1954) 347 U.S. 672,

74 S. Ct. 794, 98 L. Ed. 1035, rehearing denied (1954) 348 U.S. 851, 75 S. Ct. 17, 99 L. Ed. 670, as a case which "involved the duty of the Federal Power Commission to regulate the price paid by interstate pipelines for natural gas ultimately sold to consumers in other states" (Motion to Dismiss, p. 11). This is a curious inversion of the holding in that case. Under the Natural Gas Act (15 U.S.C., sec. 717, et seq.), the Federal Power Commission is authorized to regulate the rates charged for the transportation of natural gas in interstate commerce, or for the sale in interstate commerce of natural gas for resale—not the prices paid by interstate pipe lines. In *Phillips* the Court held that the Act applied to an independent producer selling gas in the state in which it was produced to one who transported it out of the state and sold it to others. The Court said (347 U.S. 677):

> "Petitioners admit that Phillips engages in 'the sale in interstate commerce of natural gas for resale,' as, of course, they must. Interstate Natural Gas Co. v. Federal Power Com. 331 US 682, 687-689, 91 L ed 1742, 1746-1748, 67 S Ct 1482; cf. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 US 157, 166-168, 98 L ed 583, 591, 592, 74 S Ct 396.* * *"

So here the sales of oil taxed, even though made in Colorado, where the oil was produced, were sales in interstate commerce, and not "exclusively intrastate," as Appellees contend.

Appellees also argue that even if the activities taxed were wholly interstate, the tax imposes on The California Company no more than its fair share of the tax burden, and is therefore valid, citing *Northwestern States Portland Cement Co. v. Minnesota* (1949) 358 U.S. 450, 79 S. Ct. 357, 3 L. Ed. 2d 421, and *West Publishing Co. v. McColgan* (1946) 328 U.S. 823, 66 S. Ct. 1378, 90 L. Ed. 1603. Those cases involved state taxes on a portion of the net income of foreign corporations earned from activities carried on within the taxing state. The tax in question here is a tax

on "the entire amount realized," without any apportionment. No holding as to a tax on net income, fairly apportioned, can determine the validity of a tax on the gross receipts from interstate sales, graduated or otherwise, without apportionment.

Appellees stress the local activities which, they say, forge the minimum connections necessary to satisfy jurisdictional requirements for the imposition of the tax. But as said by this Court in *Nippert v. City of Richmond* (1946) 327 U.S. 416, 423-424, 66 S. Ct. 586, 589-590, 90 L. Ed. 760, 764:

> "It has not yet been decided that every state tax bearing upon or affecting commerce becomes valid, if only some conceivably or conveniently separable 'local incident' may be found and made the focus of the tax. This is not to say that the presence of so-called local incidents is irrelevant. On the contrary the absence of any connection in fact between the commerce and the state would be sufficient in itself for striking down the tax on due process grounds alone; and even substantial connections, in an economic sense, have been held inadequate to support the local tax. But beyond the presence of a sufficient connection in a due process or 'jurisdictional' sense, whether or not a 'local incident' related to or affecting commerce may be made the subject of state taxation depends upon other considerations of constitutional policy having reference to the substantial effects, actual or potential, of the particular tax in suppressing or burdening unduly the commerce. * * *"

That the tax in question suppresses or burdens interstate commerce unduly is shown by *J. D. Adams Mfg. Co. v. Storen* (1938) 304 U.S. 307, 58 S. Ct. 913, 82 L. Ed. 1365, and the other cases cited by Appellant on pages 18 and 19 of

the Jurisdictional Statement. Appellees make no attempt to distinguish or explain any of these cases in this connection.*

In *J. D. Adams* the Court struck down an Indiana tax on the gross receipts of an Indiana manufacturer from sales of its products in intrastate, interstate and foreign commerce, saying (304 U.S. 311-312):

> "The vice of the statute as applied to receipts from interstate sales is that the tax includes in its measure, without apportionment, receipts derived from activities in interstate commerce; and that the exaction is of such a character that if lawful it may in substance be laid to the fullest extent by states in which the goods are sold as well as those in which they are manufactured. Interstate commerce would thus be subjected to the risk of a double tax burden to which intrastate commerce is not exposed, and which the commerce clause forbids. We have repeatedly held that such a tax is a regulation of, and a burden upon, interstate commerce prohibited by Article 1, § 8 of the Constitution. The opinion of the State Supreme Court stresses the generality and nondiscriminatory character of the exaction but it is settled that this will not save the tax if it directly burdens interstate commerce."

In *Mich.-Wis. Pipe Line Co. v. Calvert* (1954) 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583, cited by Appellant (Jurisdictional Statement, p. 18), the Court had before it a tax on each thousand cubic feet of natural gas "gathered" in Texas, whether for transmission in interstate commerce or for local consumption. The Court held the tax invalid, with reasoning equally applicable here, saying (347 U.S. 165-166, 170):

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*Appellees do attempt to distinguish *Mich.-Wis. Pipe Line Co. v. Calvert* (1954) 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583, in so far as that decision bears on whether the tax here is imposed on interstate commerce. That point is dealt with supra, page 6.

"* * * Frequently it has been said that interstate business must pay its way, Postal Tel.-Cable Co. v. Richmond, 249 US 252, 259, 63 L ed 590, 594, 39 S Ct 265 (1919); Western Live Stock v. Bureau of Revenue, 303 US 250, 254, 82 L ed 823, 826, 58 S Ct 546, 115 ALR 944 (1938); and the Court has done more than pay lip service to this idea. Numerous cases have upheld state levies where it is thought that the tax does not operate to discriminate against commerce or unduly burden it either directly or by the possibility of multiple taxation resulting from other taxes of the same sort being imposed by other states. The recurring problem is to resolve a conflict between the Constitution's mandate that trade between the states be permitted to flow freely without unnecessary obstruction from any source, and the state's rightful desire to require that interstate business bear its proper share of the costs of local government in return for benefits received. Some have thought that the wisest course would be for this Court to uphold all state taxes not patently discriminatory, and wait for Congress to adjust conflicts when and as it wished. But this view has not prevailed, and the Court has therefore been forced to decide in many varied factual situations whether the application of a given state tax to a given aspect of interstate activity violates the Commerce Clause. It is now well settled that a tax imposed on a local activity related to interstate commerce is valid if, and only if, the local activity is not such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it. Memphis Natural Gas Co. v. Stone, 335 US 80, 87, 92 L. Ed. 1832, 1838, 68 S Ct 1475 (1948); Western Live Stock v Bureau of Revenue, supra, (303 U.S. at 258). And if a genuine separation of the taxed local activity from the interstate process is impossible, it is more likely that other states through which the commerce passes or into which it flows can with equal right impose a

similar levy on the goods, with the net effect of prejudicing or unduly burdening commerce.

* * * * *

"Here it is perhaps sufficient that the privilege taxed, namely the taking of the gas, is not so separate and distinct from interstate transportation as to support the tax. But additional objection is present if the tax be upheld. It would 'permit a multiple burden upon that commerce,' Joseph v. Carter & Weekes Stevedoring Co., supra (330 US at 429), for if Texas may impose this 'first taking' tax measured by the total volume of gas so taken, then Michigan and the other recipient states have at least equal right to tax the first taking or 'unloading' from the pipeline of the same gas when it arrives for distribution. Oklahoma might then seek to tax the first taking of the gas as it crossed into that State. The net effect would be substantially to resurrect the customs barriers which the Commerce Clause was designed to eliminate. * * *"

So here, if Colorado may tax the gross receipts from the sale of Colorado oil in interstate commerce, the next state in which that oil is sold may again tax the gross receipts from the second sale of that oil, whether in interstate commerce or for local consumption, and so on in successive states, and there would be erected a customs barrier to the interstate movement of oil.

CONCLUSION

The Colorado tax, at graduated rates, on the gross receipts from the sale or other disposition of Colorado oil and gas (a) is unjustifiably unequal, whimsical and arbitrary, and violates the due process and equal protection clauses of the Fourteenth Amendment, and (b) imposes a

direct and unreasonable burden on interstate commerce, and violates the commerce clause of the Constitution. The ruling of the Supreme Court of Colorado to the contrary is erroneous and presents substantial federal questions.

Respectfully submitted,

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FILED
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JAMES R. BROWNING, Clerk

No. 86

October Term 1960

IN THE

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR REHEARING

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO

PETITION FOR REHEARING

Appellant petitions this Court to grant rehearing of its order of October 10, 1960, dismissing the appeal in this case for want of a substantial federal question, without citing any authority supporting this conclusion.

GROUNDS FOR PETITION

1. This case involves the constitutionality of a state tax at progressive rates on gross income.

The federal question was raised and decided in the state court below; there is no non-federal ground on which the decision of the state court can rest.

There are at least two decisions of this Court—*Stewart* and *Valentine**—holding such a tax unconstitutional.

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* *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550, 55 S. Ct. 525, 79 L. Ed. 1054;

Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32, 57 S. Ct. 56, 81 L. Ed. 22, 12 F. Supp. 760.

Graduated taxes on gross sales or receipts have been held invalid by the highest courts of at least three states: Vermont, Wisconsin and Florida.*

There is not a single decision of this or any other court —other than the decision of the court below in this case— upholding a tax at progressive rates on gross income or receipts.

To use the words of Mr. Justice Frankfurter in his dissent in *Northwestern Cement Co. v. Minn.* (1959) 358 U.S. 450, at page 473:

> "If new ground is to be broken, the ground must be justified and not treated as though it were old ground."

2. In *National Tea Co. v. State* (Minn. 1939) 286 N.W. 360, the Minnesota court held invalid a graduated tax on the gross sales of chain stores. This Court granted certiorari, saying in *State of Minnesota v. National Tea Company* (1940) 309 U.S. 551, at page 552:

> "We granted certiorari, 308 U.S. 547, 60 S. Ct. 294, 84 L. Ed. ....., because of the importance of the constitutional issues involved in Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S. Ct. 525, 79 L. Ed. 1054, and Valentine v. Great Atlantic & Pacific Tea Co., 299 U.S. 32, 57 S. Ct. 56, 81 L. Ed. 22, which cases, it was asserted, controlled the decision below."

There have been no decisions by this Court since 1940 passing on a graduated tax on gross sales or receipts, or foreclosing the questions presented here.

If the Court granted certiorari in *National Tea* in 1940, it should hear the appeal here.

3. Appellant contended, and contends, that the deci-

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* *Great Atlantic & Pacific Tea Co. v. Harvey* (Vt. 1935) 177 Atl. 423;

Ed. Schuster & Co. v. Henry (Wis. 1935) 261 N.W. 20, cert. den. (1935) 296 U.S. 625;

State v. Lee (Fla. 1936) 166 So. 249.

sions of this Court in *Stewart* and *Valentine* control this case. In upholding the tax in question, the Colorado court referred to or suggested several arguments as to why *Stewart* and *Valentine* should not control its decision, but did not clearly adopt any. Instead it said:

> "Decisions of the Federal Supreme Court following the Stewart and Valentine cases have rendered opaque that which could have been considered crystal clear by the pronouncements of those two cases."*

and after discussing several such decisions, concluded that:

> "There are intimations in the federal decisions that a tax such as this does not offend the Fourteenth Amendment."**

The Colorado court upheld the validity of the tax, then, not on the basis of any clear-cut decisions of this Court, but on the ground that the crystal clear decisions in *Stewart* and *Valentine* have been rendered "opaque" by "intimations" in later decisions of this Court. One is reminded of Mr. Churchill's "riddle wrapped inside an enigma."

In *Louisville & Nashville R. R. v. Melton* (1910) 218 U.S. 36, the Court said of a contention that an appeal should be dismissed on the ground that the federal question relied on had been conclusively foreclosed by prior decisions of the Court (pp. 49-50):

> "The contention may not prevail, even although it be admitted that a careful analysis of the previous cases will manifest that they are decisive of this. We say this because, for the purpose of the motion to dismiss, the issue is not whether the Federal question relied upon will be found upon an examination of the merits to be unsound, but whether it is apparent that such question has been so explicitly foreclosed as to leave

* App. to Juris. Statement, p. 40.
** App. to Juris. Statement, p. 43.

no room for contention on the subject, and hence cause the question to be frivolous. That this is not the case here we think results from the following considerations, *a*, because analysis and expounding is necessary in order to make clear the decisive effect of the prior decisions upon the issue here presented; *b*, because the division in opinion of the lower court as to whether the statute as construed was repugnant to the equal protection clause of the Fourteenth Amendment suggests that the controversy on the subject here presented should not be treated as of such a frivolous character as not to afford ground for jurisdiction to review the action of the court below; and, *c*, because while an examination of the opinions of state courts of last resort will show that there is unanimity as to the power consistently with the equal protection of the law clause to classify railroad employees actually engaged in the hazardous work of moving trains, such examination will also disclose that there is some conflict of view as to whether a statute on that subject as broad as is the statute under review as construed below is consistent with the clause, thus additionally serving to point to the necessity of analyzing and considering the subject anew instead of treating it as being so obviously foreclosed as not to permit an examination of the subject."

See also:

Griffith v. Connecticut (1910) 218 U.S. 563, at 571;

Linehan v. Waterfront Commission (1954) 347 U.S. 439;

Brownell v. Singer (1954) 347 U.S. 403.

So here, analysis and expounding clearly are necessary, to say the least, for anyone to reach the conclusion that prior decisions of this Court justify this tax, and since the validity of a progressive tax on the gross receipts from

the production of oil and gas has never been passed upon, the question presented cannot be said to be foreclosed by prior decisions of this Court.

4. In its opinion the Supreme Court of Colorado also suggests that *Stewart* and *Valentine* would be overruled if the questions put in those cases were presented to this Court anew, saying:

> "Are decisions subsequent to the Stewart case, and a few state decisions hereinafter discussed straws in the wind? Are there indications that the Stewart minority opinion would be adopted if the Federal Supreme Court could entertain anew the question? The State of Colorado in the instant case assiduously advocates the likelihood of a change of philosophy by reason of the evolution of the law and the difference in cast composing the highest court of the land at this time."*

In its motion to dismiss the appeal herein, however, the State of Colorado seeks to distinguish *Stewart* and *Valentine* rather than urging the Court to overrule these decisions.

It is impossible to tell from the order of October 10, 1960, whether this Court agrees with the argument of the State of Colorado before the Colorado court that *Stewart* and *Valentine* are no longer good law, or with the argument of the State of Colorado before this Court that these cases are distinguishable here.

Are state courts hereafter to decide federal constitutional questions by trying to guess whether the then current members of this Court would decide controlling cases the same way if presented with them anew?

If this Court is to retain and exercise effective control of the adjudication of federal constitutional issues it should hear and decide this appeal.

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* App. to Juris. Statement, pp. 41-42.

5. The tax in question is not a severance tax. Colorado has ruled that the tax applies only to oil and gas severed and sold, and not to oil and gas severed and used or wasted. Thus the tax is laid not on the severance, but on the sales, including sales in interstate commerce. This means (a) that the measure of the tax bears no reasonable relation to the activities local to Colorado, i.e., the severance of oil and gas, and that these activities cannot afford a basis for the tax; and (b) that the tax is a direct and undue burden on interstate commerce, subjecting it to the possibility of multiple taxation.

6. The tax involved in this case is of a type which has been discussed with increasing frequency in recent years. Legislators, bench, bar and business would be indebted alike for a clarification of the important constitutional questions involved in this appeal.

It is respectfully submitted that this petition for rehearing should be granted, and probable jurisdiction of this appeal noted.

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I, JOHN P. AKOLT, one of the attorneys for The California Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN P. AKOLT